United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

32-L

63

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 24208

MARIA A. LAWSON,

v.

GIANT FOOD, INC., *Appellant.*

No. 24219

MARIA A. LAWSON,

v.

ROCK CREEK GINGER ALE CO., INC., *Appellant.*

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX

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TABLE OF CONTENTS

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

MARIA A. LAWSON
390 N Street, S.W.
Washington, D. C.

Plaintiff

v. Civil Action No. 833-'68

GIANT FOOD, INC.
c/o Joseph B. Danzansky,
Registered Agent
1120 Connecticut Avenue, N.W.
Suite 1010
Washington, D. C.

and

ROCK CREEK GINGER ALE
CO., INC.
C/O Corporation Guar-
antee & Trust Company
Registered Agent
1730 Rhode Island Avenue, N.W.
Washington, D. C.

Defendants

Docket Entries

1970

January 8 - Jury and two (2) alternate jurors sworn; trial begun; respited until Jan. 9, 1970. (Rep: Phyllis Harper) Corcoran, J.

January 8 - Appearance of Lynn D. Allan, entered as co-counsel for the pltff. (ACN) filed.

January 9 - Trial respited until January 13, 1970. Cocoran, J.

January 13 - Trial resumed; juror number 11, excused by Court, alternate juror number 1, takes seat number 11; respited until Jan. 14, 1970. (Rptr. Eva Sanche) Corcoran, J.

January 14 - Trial resumed; juror number 11 excused by the Court; alternate juror Number 2 takes seat number 11; trial respited until Jan. 15, 1970; (Rptr. Eva Sanche) Corcoran, J.

January 15 - Trial resumed; same jury; verdict for pltf. vs. defts. in sum of $26,035.01. (Rptr. Phyllis Harper). Corcoran, J.

January 15 - Verdict and Judgment for pltf. against defts. in the sum of $26,035.01, with costs. (N) Corcoran, J.

January 15 - Note from jury, filed.

January 20 - Bill of costs as verified by pltf's counsel; c/m 1-19, filed.

January 20 - Costs taxed by the Clerk in the amount of $180.37 in favor of pltf. vs. defts. (N), filed.

January 22 - Motion of deft. No. 2 to set aside jury verdict; memorandum; c/m 1-20; M.C., filed.

January 22 - Objection of deft. No. 2 to bill of costs; P&A; c/m 1-20; M.C., filed.

January 22 - Transcript of proceedings, Vol. A; pp. 1 thru 35, January 13, 1970; Reporter: Eva Marie Sanche, Court's copy.

February 5 - Memorandum of pltf. opposing motion for judgment N.O.V. for a new trial and for remittitur; c/m 2-5., filed.

March 2 - Hearing begun, concluded; motion of defts. to set aside verdict and enter judgment for defts., or for new trial and/or for a remittitur denied. (Rep: Eva Marie Sanche) (order to be presented) Corcoran, Jr.

March 9 - Order denying motion of defts. for new trial; denying motion of Defts. for judgment N.O.V. & denying motion of defts. for remittitur. (N) Corcoran, J.

April 2 - Excerpt of proceedings Jan. 13, 1970; Vol. A; pgs. 1 thru 35; Court Reporter, Eva Marie Sanche. See over (deft's copy), filed.

April 2 - Excerpt of proceedings Jan. 13, 1970, Jan. 14, 1970 and March 2, 1970; Vol. A-1; pp. 36 thru 153; Court Reporter: Eva Marie Sanche. (deft's copy), filed.

April 2 - Notice of appeal by deft. No. 2 from order of Jan. 15, 1970; copies mailed to John W. Karr and Anthony E. Grimaldi; deposit by Doherty $5.00, filed.

April 3 - Notice of Appeal from Order of January 15, 1970. Copies mailed to John W. Karr and Cornelius Doherty, Jr. Deposit $5.00 by Clague, filed.

April 6 - Instructions of pltf., filed.

April 6 - Instructions of defts., filed.

April 8 - Notice pursuant of Rule 10(b) FRCP; c/m 4-7-70, filed.

April 13 - Order setting $121.87 as allowable and taxable as pltf's bill of costs to defts. (N) McGuire, J.

April 15 - Supersedas undertaking on appeal by deft. No. 2 in the amount of $30,000 with Hartford Accident and Indemnity Co. approved. Corcoran, J.

April 23 - Transcript of proceedings January 13, 1970, January 14, 1970 and March 2, 1970, Vol. A-1, pages 36 thru 153. (Reporter: Eva Marie Sanche, Court's copy.), filed.

COMPLAINT

(Damages for Personal Injury: Exploding Bottle in Grocery Store)

1. Plaintiff is a resident of the District of Columbia; defendants are business Corporations operating in and under the laws of the District of Columbia. Jurisdiction is conferred herein by Sec. 11-521 of the District of Columbia Code (1967 Ed.).

First Cause of Action

2. On Friday, September 16, 1966, plaintiff was shopping in a grocery store owned and operated by defendant, Giant Food, Inc. (hereafter "Giant") located at the corner of Wisconsin Avenue and Newark Street, N.W., Washington, D. C.

3. Giant operates this store as a self-service grocery market in which customers select merchandise previously placed on open shelves by agents or employees of Giant, and carry the merchandise thus selected to "check-out" counters superintended by cashiers (also employees of Giant).

4. Defendent, Rock Creek Gingerale Co. Inc. (hereafter "Rock Creek") bottles, packages and distributes a wide assortment of carbonated beverages under a variety of trade names, including one styled "Blair House Club Sode".

5. On the day and at the time mentioned above plaintiff selected a pre-packaged carton containing six bottles of Blair House Club Sode from Giant's display of Rock Creek's beverages; as she lifted the carton to her basket, one or two bottles fell through the bottom of the carton, struck the floor and shattered, projecting pieces of broken glass into the plaintiff's right leg.

6. This incident was proximately caused by the negligence of defendant Giant, in that Giant failed to install, maintain, replenish and supervise in a safe and careful manner its assortment of carbonated beverages, and particularly the carton of beverages from which the bottles which injured plaintiff fell, any by its failure carefully to inspect for any defects the cartons or bottles its agents or employees placed on display.

7. The instrumentality which injured plaintiff was at all relevant times under the exclusive control and supervision of defendant, Giant; but for the negligence of defendant Giant, the incident would not have occurred and plaintiff would not have been injured.

8. As the result of the negligence of defendant Giant, plaintiff sustained serious, painful and permanent injuries to her right leg; a tendon in her right ankle was severed; she was required to undergo surgery on two separate occasions; she was hospitalized for a substantial period of time and totally disabled for several months; she was required to expend substantial sum of money for medical and surgical care, hospitalization and other expenses related to this injury; she has suffered considerable pain and emotional distress as a result of this injury; and she sustained other damage; all to the damage of the plaintiff in the sum of Twenty Five Thousand Dollars ($25,000.00).

WHEREFORE, plaintiff demands judgment against defendant, Giant Food, Inc. in the sum of $25,000.00 plus costs.

Second Cause of Action

9. Plaintiff restates and incorporates by reference the allegations contained in paragraphs 2 through 5.

10. Plaintiff's injruy was proximately caused by the negligence of defendant Rock Creek in that it failed to exercise ordinary care

in the packaging of the carton from which the bottles which injured plaintiff fell and failed to exercise the supervisory care to insure that the cartons were safely and securely attached.

11. The instrumentality which injured plaintiff was at all relevant times under the exclsuive control and supervision of defendant Rock Creek; but for the negligence of defendant Rock Creek, the incident would not have occurred and plaintiff would not have injured.

12. As the result of the negligence of defendant Rock Creek, plaintiff sustained serious, painful and permanent injuries to her right leg; a tendon in her right ankle was severed; she was required to undergo surgery on two separate occasions, she was hospitalized for a substantial period of time and totally disabled for several months; she was required to expend substantial sums of money for medical and surgical care, hospitalization and other expenses related to this injury; she has suffered considerable pain and emotional distress as a result of this injury; and she sustained other damage; all to the damage of the plaintiff in the sum of Twenty Five Thousand Dollars ($25,000.00).

WHEREFORE, plaintiff demands judgment against defendant, Rock Creek Ginger Ale Co., Inc. in the sum of $25,000.00 plus costs.

/s/ John W. Karr
Attorney for Plaintiff

ORDER

Upon consideration of the Motions of defendants, Giant Food, Inc., and Rock Creek Gingerale Ale Co., Inc., for a new trial; for judgment non obstante veredicto; and for remittitur, of the plaintiff's opposition thereto and of the hearing held thereon, it is by the Court this 9th day of March, 1970

ORDERED, that the Motion of defendants for a new trial be, and the same hereby is, denied, and it is further

ORDERED, that the Motion of defendants for judgment non obstante veredicto be, and the same hereby is, denied, and it is further

ORDERED, that the Motion of the defendants for remittitur be, and the same hereby is, denied.

/s/ Howard Corcoran
Judge

PRETRIAL ORDER

Damages for personal injuries due to negligence.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO:

The D Rock Creek Ginger Ale Co. Inc. (Rock Creek) is a corporation authorized to do business in the District of Columbia, which bottles packages and distributes a beverage known as "Blair House Club Soda".

The D Giant Food, Inc. (Giant) is a Delaware Corporation which does business in the D of C and operates a grocery store at the corner

of Wis. Ave. and Newark St. N.W. Washington, D.C. On Fri. Sept. 16, 1966 at about 9:30 A.M. the P was involved in a accident in said D store.

THE PLAINTIFF CLAIMS that while an invitee in the aforesaid store of Giant she was injured when a bottle or bottles dropped from a prepackaged six-pack carton of Blair House Soda that she had selected the six-pack carton from an area of the store in which similar packs where on display; that as she lifted the carton to her basket, one or two bottles fell through bottom or end of the carton, struck the floor and shattered, projecting pieces of broken of glass into her right leg.

She asserts that the accident, her injuries and damages were caused by the negligence of the Ds as follows:

Giant – failed to keep its store in a condition reasonably safe for the P in that it failed to organize, install, maintain, replenish, and supervise its assortment of carbonated beverages, in a fashion which would avoid an accident of the type complained of; failed to inspect cartons and bottles of soda as placed on display for defects; failed to discover defects in the cartons or bottles which were involved in P's injury of all of which it failed to warn the P of danger.

Rock Creek – failed to package properly the cartons from which the bottles which injured P fell because, if proper packaged or placed in a proper carton, the bottles would not have fallen therefrom; failure to inspect and to discover defects in the carton and defects in the bottle or bottles which caused P injuries. Failure to establish, and once established, to implement, appropriate standards for the discovery of defects in bottling, packaging, and merchandising of its product which the D knew or should have known individually or in combination, could produce injuries to consumers.

BOTH DEFENDANTS – P relies on the document res ipsa loquitir.

Claimed injuries – severance of long, extensor tendon of toes, three, four, and five, Dorsum right foot, resulting in an severance of sensory nerves to the right big toe.

There was temporary partial disability from the date of the accident, Sept. 16, 1966 until Feb. 1968. In addition, there is 10% permanent disability, based upon hypesthesia of the dorsum of the right toe and the scar at the ankle.

P also suffered considerable emotional trauma.

Claimed special damages:

Georgetown University Hospital	q $461.51
Alan R. Crain, M.D.	$585.00
Miscellaneous drugs and medicine	$150.00
Total medical expenses	$1,196.51

BOTH DEFENDANTS deny all allegations of negligence, deny the applicability of the doctrine of res ipsa loquitir and deny P's sustained injuries and damages of the nature and to the extent claimed.

Further they assert that P's injuries and damages if any, were caused by her sole or contributory negligence in failing to handle the carton of soda carefully.

Each of the Ds denies that it had exclusive control of the carton of soda which P claims caused her injuries.

D Giant CROSS-CLAIMS against the other D for contributions as to any sums which may be recovered by the P, contending that if it is negligent, the injuries and damages resulting to the P were caused by the concurrent negligence of the D, Rock Creek Ginger Ale Co. Inc. Adopting the allegations of the P in these respects.

Giant Food also defends P action on the basis that P's injuries and damages if any were caused by the negligence of the D, Rock

Creek adopting the allegation of the P in this respect or the concurrent negligence of the P and Rock Creek as stated herein.

The D Rock Creek denies all the allegations in the counterclaim of Giant and denies Giant is entitled to recover on its cross-claim.

FURTHER STIPULATIONS:

A list of witnesses known to the P and to Giant is attached hereto, made a part hereof, and incorporated herein by reference marked "A".

The parties agree to file with the Clerk of the Court and to mutually exchange, on or before Nov. 22, 1969, a list of the names and addresses of any witnesses known to them other than those listed herein, including medical and expert witnesses, who have knowledge of any aspect of this case, indicating those who may be used at the trial. Impeachment witnesses are not to be included.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before Nov. 22, 1969, and a similar exchange of all other such reports within 48 hours of the alert of this case for trial.

Counsel for P shall make the P available for the purpose of a physical examination by physician of Ds's choice, before, but not to interfere with, trial date.

Counsel for P shall furnish the Clerk of Court and opposing counsel on or before Nov. 22, 1969, a written itemized list of all special damages not listed herein which will be claimed at the trial, past, present, and future, actual or estimated.

The following may be admitted in evidence without formal proof subject to all legal objectons:

Hospital Records
HEW Mortality tables

MOTION TO SET ASIDE THE JURY VERDICT, AND TO ENTER JUDGMENT FOR THE DEFENDANTS, OR GRANT A NEW TRIAL, AND/OR TO GRANT A REMITTITUR

Comes now the defendants, by and through their attorneys and move this Honorable Court for a judgment to set aside the jury verdict, and to enter judgment for the defendants, or grant a new trial, and/or to grant a remittitur, and for reasons therefore aver as follows:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The evidence is insufficient to establish liability on the part of the defendants, and there is no evidence to sustain the verdict of the jury herein.

4. The evidence of the plaintiff considered in its most favorable light, establishes a theory on which there may be liability, and one in which there is no liability, and therefore neither is proved.

5. The plaintiff was contributorily negligent as a matter of law.

6. The verdict of the jury hrein is excessive, and was the result of passion and prejudice and resutled in the punishment of the defendants.

7. The court erred in the admission of the following evidence:

a) Admission of the alleged defective carton;

b) Admission into evidence of testimony in regard to the bottles, the pressure therein and the dangers inherent thereto;

c) The admission into evidence of testimony with regard to the time, place and mode of delivery of the product in question on the bases of customary practice;

d) The admission of testimony with regard to prior accidents and problems concerning cartons and bottles;

e) In denying defendant, Rock Creek Ginger Ale Co., Inc.'s motion to quash subpoena duces tecum.

8. And for such other and further reasons as may be advanced at the hearing of this motion.

* * *

NOTICE OF APPEAL

Notice is hereby given this 3rd day of April, 1970, that Giant Food, Inc. hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 15th day of January, 1970 in favor of plaintiff, Maria A. Lawson against said Giant Food, Inc.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
January 13, 1970

[3] MARIA A. LAWSON

called as a witness on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KARR:

Q. Mrs. Lawson, will you give us your full name and where you live? A. My name is Maria Lawson. I live at 390 N Street, Southwest.

Q. Would you talk right into the microphone, please, so everyone can hear you.

Is that, Mrs. Lawson, an apartment or a house? A. A house.

Q. How big is that house? A. It's a small house, with three bedrooms. On the first floor is the living room and the kitchen, and on the second floor is the bedrooms, and there is a basement.

Q. There is a basement, first floor and second floor? A. Yes.

[4] Q. On September 16th, 1966, were you living at the same place? A. Yes.

Q. Where was it you were accustomed, back then, to do your grocery shopping? A. Always we went to Giant's.

Q. Which Giant's? A. On Wisconsin.

Q. And why was it that you went up to that Giant's on Wisconsin, Mrs. Lawson? A. Because my neighbor and friend who lived next door, always we go there and take her husband to his work and we stopped by to buy the groceries together.

Q. Please keep your voice up so everyone can hear you. What was your friend's name, or is your friend's name? A. Mrs. Quick, Louise Quick.

Q. Does Mrs. Quick still live near you? A. No. She moved last year.

Q. Now, what day of the week was September 16th, 1966, Mrs. Lawson? A. Friday.

Q. Was that the day of the week that you usually did your shopping? A. Yes. Always we went on Friday to do shopping.

Q. On September the 16th, that Friday, did you go [5] shopping with Mrs. Quick? A. Yes. We went and we let her husband at his office and we came back to do shopping at the store.

Q. Was Mr. Quick's office close to the store? A. Yes, about one or two blocks.

Q. What time did you get to the Giant store at Wisconsin Avenue and Newark Street? A. Between nine and nine-thirty.

Q. And would you tell us what you did when you went into the Giant store? A. I went to do my shopping and I finished. I checked out. I was waiting for Mrs. Quick.

Q. Did you do all of your shopping? A. Yes, I did all and I was there waiting for Mrs. Quick. I saw her. She was far.

Q. Where were you waiting for Mrs. Quick? A. Oh, close by to the window.

Q. Had you gone through the check-out counter? A. Oh, yes. I had my basket. Everything was in my basket. When I saw her she was far from the line, I—

Q. What do you mean "far from the line"? A. Still she was shopping. I thought she would be there for perhaps another ten minutes, so I went back to pick up some of the soda that I had forgot.

Q. What soda was that, Mrs. Lawson? [6] A. Well, I was buying this kind of soda, the Rock Creek soda.

Q. Was it called Rock Creek or was it called something else? A. Well, I don't remember. Always I go and I pick up this soda, I think Blair House, and—

MR. KARR: Just a minute, please.

Your Honor, may we have this six pack of soda marked Plaintiff's Exhibit No. 1 for identification?

MR. DOHERTY: I don't think you should pull that out.

He has to show some foundation. He knews better than that, Your Honor.

MR. KARR: No, that's not true, Your Honor.

THE COURT: Exhibit it to the defense counsel.

MR. KARR: I sure will, Your Honor.

THE COURT: First have it marked for identification and exhibit it to defense counsel.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 1 marked for identification.

(Six pack of soda marked Plaintiff's Exhibit No. 1 for identification.)

(Exhibit was shown to opposing counsel.)

BY MR. KARR:

Q. Mrs. Lawson, let me show you Plaintiff's Exhibit No. 1 marked for identification—

[7] MR. GRIMALDI: Objection. May we approach the Bench, Your Honor?

THE COURT: Surely.

(At the Bench:)

MR. KARR: This is an identical six pack of Blair House soda. What is the objection?

MR. GRIMALDI: I am objecting because there is no foundation that this is the six pack in question. I want a proffer from counsel for it. If it is to identify the co-defendant and ask her if this is the kind of soda, I am going to object. You can't lead her and lead her and show her something and have her say yes.

MR. KARR: What is your objection, that it is leading?

MR. GRIMALDI: Yes.

MR. KARR: It is certainly not leading if I say, Is this the same kind of six pack that you tried to pick up that day? That is not leading, Your Honor.

MR. GRIMALDI: I don't know what you are going to do with the carton after that.

MR. KARR: When she identifies it is the club soda in the same kind of package that she attempted to pick up, I am going to offer it in evidence.

MR. GRIMALDI: For what purpose?

MR. KARR: For the purpose of showing the type of case.

[8] MR. GRIMALDI: That's not the best evidence. We should have the original carton.

MR. KARR: We don't think we have the original carton.

This is simply to show the type of carton that was filled with soda bottles at the time Mrs. Lawson picked it up from the cardboard tray.

The only objection is that it is leading, and it is plainly not leading. As I understand it, that is the objection.

MR. DOHERTY: I join in this objection. She has to testify as to what kind of soda it was. She has to lay the foundation. He can't come in here and exhibit everything to her and show her the answer to every question he asks.

MR. KARR: She has said it was Blair House.

MR. DOHERTY: I didn't hear her say that.

MR. GRIMALDI: She said she didn't know if it was Rock Creek.

THE COURT: Well, I will permit her to identify it as an identical package to what she picked up.

MR. KARR: Yes, Your Honor.

(In Open Court:)

BY MR. KARR:

Q. Mrs. Lawson, I show you a six pack marked Plaintiff's Exhibit No. 1 for identification. Will you tell us whether or not that

is identical to the carton that you selected that morning on September 16th? [9] A. Yes. Uh-huh.

Q. Is it? A. Always for the color, I know what kind of soda I want.

MR. DOHERTY: I didn't get the answer.

THE COURT: I didn't get the answer either.

Would you clarify it, please.

BY MR. KARR:

Q. Would you repeat the answer, please? A. When I saw the carton, I know what kind it is that I want.

THE COURT: That is not the answer to the question.

BY MR. KARR:

Q. Is that identical to the carton that you selected on September the 16th, 1966? A. Yes, it is.

Q. Was there any special reason why you bought Blair House Club Soda? A. Well, because we used this.

Q. Pardon me? A. We used this kind of soda. We liked this kind of soda.

Q. Well, did you ever buy anything other than Blair House Club Soda? A. Ginger Ale but soda, only this one.

Q. Mrs. Lawson, when you left the area of the check-out counter and went back to pick up the six pack of club soda, tell [10] us what happened. A. I went back and I took it around here (indicating), you know.

Q. Well, where was the six pack, first of all? A. Oh, this was in front of the shelves in boxes.

Q. Was it on the shelf? A. No, it was on the floor.

Q. All right. A. It was one box on the top of the other.

Q. What do you mean "one box on the top of the other"? Explain your answer. A. Well, the box cartons—I think they have four of these packages in each carton.

Q. How big was the carton into which four of those six packs fit? A. Well, they have four of this in each one.

Q. Describe the carton for us in which they were. A. What they call the tray?

Q. Yes. Describe that for us. A. They was there and I went there and I—

Q. No. Describe the tray for us. Tell us what the tray looked like. A. Well, it was carton and just one edge around.

Q. It had a side on it, you say? A. Yes.

[11] Q. Now, where did the four six packs fit in that tray? A. On the top.

Q. How high were those trays piled one on top of the other in front of the counter of club soda? A. Well, about as high as my waistline.

Q. As high as your waistline? A. Yes, about. It could be a little bit lower or maybe a little bit higher. It was about that high.

Q. Now, how many six packs of club soda were in the cardboard tray from which you took the pack of club soda? A. I think this was the only one.

Q. Was it full or less than full, that six pack? A. It was six bottles in the pack.

Q. Now, describe for us how you went about taking that six pack out of that tray? A. Well, I took it from here (indicating), and I pulled it to me.

Q. Were you standing when you did this? A. Yes, I was standing close by.

Q. Where were you standing? A. In front of these boxes.

Q. In front of the stack of trays? A. Yes, the stack of trays.

Q. Tell us what you did. A. Well, I pulled it to me like this (indicating) and [12] only then I heard the noise.

Q. What happened as you started picking it up and pulling it towards yourself? A. I heard a noise and I put back right away the rest, and I stayed there because nobody was around me.

Q. What noise did you hear? A. Well, the explosion of the bottle.

Q. Where? A. In the floor.

Q. All right. A. And in this moment, in seconds, the manager and one lady who was working in the aisle after,–

Q. Had you seen that lady before this accident? A. Oh, yes, when I was doing my shopping, I saw her. She was putting something on the shelves. The manager he came. He was very nice.

Q. What was the manager's name? A. Oh–

Q. Mr. McCoart? A. Mr. McCoart, yes.

Q. What did Mr. McCoart, the manager, do when he came? A. Oh, right away he told the lady to remove the glass and bring me one chair, and I told him I prefer to sit down on the floor because I wasn't feeling well. And I sit down there and he sit down with me too, and–

[13] Q. He sat down next to you? A. Yes, he sit down on the floor too, and he helped me. He held my head in his hand and he said, "Breathe deep" and do this and do that because I asked for alcohol because I wasn't feeling well, and he ordered one man who was there too to bring me something and they bring me some salts.

Q. Who was this man he ordered to bring you some smelling salts? A. I don't know who he was. He was there.

Q. Did he work in the store too? A. Yes.

Q. What happened after than man brought you some smelling salts? A. I got better and the manager, he asked me if I was by myself and I said, no, I was with Mrs. Quick. And they called her.

Q. How? A. I don't know how they called her.

Q. All right. A. And in the same time, he order to the man to remove the carton.

Q. Now, where was this carton? A. It still was in the tray.

Q. At waist height? A. Oh, yes. It was in the same tray, the carton tray.

[14] Q. All right. A. And when the man he picked up this, the other four bottles they fall down in the tray.

Q. Did he pick it straight up? A. Yes.

Q. Did you see why the bottles fell out of the six pack? A. It was open underneath.

Q. What was open underneath? A. The carton was open.

Q. Now, what happened then, Mrs. Lawson? A. And then Mrs. Quick was there and she asked me if I can walk. She said she was going to bring the car if I can walk, and I said yes.

Q. Who said this, Mrs. Quick? A. Mrs. Quick. And the manager, he said no—

MR. GRIMALDI: Just a moment.

Your Honor, I would object to the testimony on the part of the manager. In all honesty, I can't really hear all of the testimony.

THE COURT: I, frankly, am not following all of it either.

MR. KARR: I am trying to interrupt it, if the Court please, to try to give it some continuity.

THE COURT: Would you come to the Bench a minute.

[15] MR. KARR: Surely.

(At the Bench:)

THE COURT: I caught something of a conversation with Mrs. Quick.

MR. KARR: This was in the presence of the manager of the grocery store.

THE COURT: What are you proffering?

MR. KARR: Nothing. That was just volunteered. The Court can observe the not great but modest difficulty she has with the language, and this is the problem—

MR. GRIMALDI: I would suggest that you go a little more slowly. Don't go to the next question until we get the answer to the first.

THE COURT: I, frankly, am not getting it all.

Forget about this conversation with Mrs. Quick unless you can lay a foundation.

MR. GRIMALDI: It is totally irrelevant.

THE COURT: Leave it out.

MR. KARR: You don't have any objection to conversations with the manager, do you?

MR. GRIMALDI: I certainly do.

MR. KARR: He is the manager, the agent for that store.

MR. GRIMALDI: What are you going to ask; What is she going to testify about him?

[16] MR. KARR: He made comments about her injury and he ordered the ambulance. That's all.

MR. GRIMALDI: If that is all, then I have no objection.

THE COURT: Do you have any admissions against interest?

MR. KARR: No.

THE COURT: As long as there is no admission against interest—

MR. KARR: It is part of the narrative.

THE COURT: That he was going to get an ambulance is one thing, but don't produce anything to the effect that this is my fault or something like that.

MR. KARR: No, no. Fair enough.

There are two written statements that the manager prepared which we have never gotten copies of.

MR. GRIMALDI: This is not a timely request. We are not trying a Jencks case.

MR. KARR: We will subpoena them then.

MR. GRIMALDI: This case has been on for trial for some time now and if they wanted the statements produced, they should have filed a motion for production. I am not going to start reviewing my file now.

MR. KARR: All I want are two written statements.

THE COURT: Well, let's get to that later. Let's [17] get this witness off the stand.

MR. KARR: Yes, Your Honor.

(In Open Court:)

BY MR. KARR:

Q. Mrs. Lawson, will you take us from the point at which the bottles had dropped to the floor and you were waiting for somebody to come, what happened? A. In the same time, the manager and one lady who was working in the next aisle they came.

Q. They came to where you were standing? A. Yes.

Q. The manager being Mr. McCoart? A. Yes.

Q. Do you know who the lady was? A. No.

Q. All right.

Those two people, the manager and a lady who worked in the store, came to where you were standing in front of the cartons, right? A. Yes. I was standing there and the manager, he ordered to bring one chair for me to sit down.

Q. He ordered somebody who was working in the store– A. To the lady, yes. And I said, No, I prefer to sit down here on the floor.

Q. You said that to the manager that you preferred to [18] sit on the floor? A. Yes, because I preferred to keep my leg straight, and he sit down with me too. And he helped me because I was not feeling well and he says–

Q. Wait, Mrs. Lawson. You say he helped you. What do you mean? A. Because I asked for alcohol because I was not feeling well.

Q. All right. A. And he kept my head in his hands and he started telling me, "Breathe deep" and I don't remember what the manager said, but all this time he was talking to me and I was doing what he said. And later, they give me one salts to smell.

Q. Some smelling salts? A. Yes.

Q. Who gave you those? A. The one man, he brought this.

Q. Mrs. Lawson, let me interrupt you for just a moment. Right after you heard what you heard, right after the bottles hit the floor and exploded, did you look down to see if anything was wrong with you? A. Yes.

Q. What did you see? A. I saw one cut in my ankle.

Q. Which ankle? [19] A. On the right leg.

Q. The ankle of the right leg? A. Yes.

Q. Was it bleeding at all? A. I don't remember. I don't think so.

Q. It wasn't bleeding. A. No.

Q. Did it hurt? A. At this moment, I don't think so. I don't remember now.

Q. But it didn't hurt enough that you couldn't move it, did it? A. No, no.

Q. All right. A. And at the same time, the manager he ordered something and he covered the injury.

Q. He covered your ankle? A. Yes.

Q. With what, Mrs. Lawson? A. With gauze or something.

Q. All right. A. And later, he asked me if I was by myself and I said, "No, I am with Mrs. Quick." And they called her and at the same time, he ordered to one of the men, the same man who brought me the salts—the smelling salts, he ordered to him [20] to remove the carton.

Q. He ordered that man to remove the carton? A. Yes.

Q. All right. Where was the carton at that time? A. In the tray. In the same place it was before.

Q. All right. A. And when he picked up then the four bottles, they fall down in the tray.

Q. Did you see why they fell down? A. Because it was open underneath.

Q. What was open underneath? A. The carton.

Q. The carton that had contained those six bottles? A. Yes.

Q. All right. Now, what did the manager do then about you? A. At first time, my neighbor she went to move the car so that she can take me home and the manager said, "No. We call to the ambulance and they are going to come to take you to Gerogetown."

Q. Georgetown what, Hospital? A. Hospital, yes. And later, they came.

Q. Who came, Mrs. Lawson? A. The two men from the Ambulance. And they asked me if I can walk.

[21] Q. Did those two men from the ambulance come into the store? A. Yes, they went inside and they asked me if I can walk, and I said yes. I stand up but I cannot take one step.

Q. You stood up from the floor? A. Yes, they helped me to stand up but I cannot move my foot.

Q. You could not move which foot? A. My right. And at this time, they brought this stretcher.

Q. A stretcher? A. Yes. And they put me in there, and I went to the hospital.

Q. Was the stretcher on wheels? A. Yes.

Q. Did they take you out into the ambulance? A. Yes.

Q. Did the ambulance then take you to the hospital? A. To the hospital and I went to the Emergency Room.

* * *

(Testimony pertaining to medical treatment and medical expenses, reported but not made a part of this record.)

* * *

By MR. KARR:

[22] Q. Mrs. Lawson, have you ever had any kind of injury before in your life? A. No.

Q. No kind of injury at all? A. No.

Q. Have you ever been disabled for any other reason at any time in your life? A. No.

Q. This is the first time? A. Yes.

MR. KARR: Your Honor, I move the admission in evidence of Plaintiff's Exhibit No. 1 marked for identification and identified by the plaintiff as a six-pack carton of sodas.

MR. DOHERTY: Your Honor, may we approach the Bench?

THE COURT: Surely.

(At the Bench:)

MR. DOHERTY: If Your Honor please, I would like to know the purpose for the introduction of this six pack. It is not claimed to be the carton that was involved.

THE COURT: There is testimony that this is identical to the one she attempted to pick up. Its purpose is so the jury will have a picture of what it looked like.

MR. DOHERTY: All right, sir. With that understanding, I have no objection.

[23] THE COURT: It will be admitted.

MR. KARR: Thank you, Your Honor.

(In Open Court:)

THE DEPUTY CLERK: Plaintiff's Exhibit No. 1 admitted in evidence.

(Plaintiff's Exhibit No. 1 for identification was received into evidence.)

MR. KARR: May I pass it to the jury, Your Honor?

THE COURT: To save time, let them look at it in the jury room.

MR. KARR: Fine.

THE COURT: You will be permitted, ladies and gentlemen of the jury, to look at all the exhibits that are in evidence when you deliberate in the jury room.

BY MR. KARR:

Q. One other question, Mrs. Lawson: What time of the morning was it on September 16th, 1966 that you were injured? What time of the morning? A. After nine o'clock.

Q. Well, can you give us a more precise idea? A. Perhaps between nine and nine-thirty.

Q. Between nine and nine-thirty on the morning of September the 16th? A. Yes.

[24] Q. Mrs. Lawson, from the time you got into the Giant store that morning on September 16th, that Friday morning, until the time that you were injured at any time did you see anyone stacking those sodas in front of the soda display counter? A. No.

Q. Did you see anyone who looked like a delivery man? A. No.

Q. Anyone who looked like somebody who was bringing soda bottles in? A. No, the only one I saw was the lady who was in the other aisle.

Q. Was that lady doing anything with the soda bottles? A. Oh, no, no. She was in the other aisle.

MR. KARR: That is all I have. Thank you.

MR. GRIMALDI: Your Honor, this defendant has no questions.

THE COURT: Very well.

Mr. Doherty.

CROSS EXAMINATION

BY MR. DOHERTY:

Q. Now, Mrs. Lawson, you say that Plaintiff's Exhibit No. 1, the six-pack carton shown to you is the type of beverage that you were going to buy that day? A. Yes.

Q. Is that the kind you always bought? [25] A. Yes.

Q. You never bought anything else? A. This day?

Q. No, any other time. A. Oh, yes.

Q. Would you buy other types of soda? A. The soda, no. Since first time I come to the market, always I pick up this one.

Q. Did they have other kinds of soda there? A. I think so.

Q. Do you know what kinds? A. Well, now I know many kinds. Every brand has the soda, but this was the kind of soda always I took.

Q. Blair House? A. Yes.

Q. And you are sure about that? A. Yes.

Q. And that was the kind that you attempted to purchase on September 16th? A. Yes.

Q. Now, as I understand it, you picked up the six pack out of a box that had a side on it; is that correct? A. Yes.

Q. And there was only this one six pack in that box, is that correct? [26] A. Yes.

Q. Now, when you picked it up, what did you do, put your fingers in the top? A. Yes, because this was there (indicating).

Q. The normal way of carrying it. A. Uh-huh.

Q. Did you put both fingers in? A. Yes.

Q. And did you lift it straight up? A. That wasn't necessary because it was almost right here. I don.t have to do this (indicating and I don't have to bend.

Q. Well, did you pick it up? A. No, only to—I have only to do this (indicating) to reach this to the end. That's all.

Q. You never picked it up? A. No, that wasn't necessary to pick it up. And the boxes the way they was, they not was high and they not was too low.

Q. But you are positive that you never picked up this particular six pack? A. Yes, I am.

Q. You never used any pressure to pull it up at all? A. No.

Q. And what did you do with the six pack? [27] A. I reached and I just pulled to the end, and later I hear the noise and I—

Q. You reached for it and you put your hand on it, is that correct? A. Uh-huh. I put my hand there and I reached to the end.

Q. Wait a minute now. You reached for it and you put your fingers in there. A. Hu-huh, that's the only way you can pick up that.

Q. All right, but you didn't pick it up? A. No, because I didn't have to do that (indicating).

Q. All right. But then you pulled it toward you? A. I pulled it, yes.

Q. And what happened? A. And this moment, I heard the noise and I put them back because—

Q. Were they in the box when that happened? A. In the box? No, they was on the floor.

Q. Well, how did they get on the floor? A. Well, I don't know. When they came in the end, huh, because they went on the floor. I heard the noise and I put back right away the rest.

Q. But the box had a side on it, didn't it? A. Uh-huh.

Q. Well, how did the bottles get over the side? [28] A. Well, perhaps I have to do this (indicating). I don't pick up like this (indicating), just like that.

Q. Well, I thought you didn't pick it up. A. I don't have to pick it up. The side was this way (indicating). For this, you can reach like this; you don't have to do that (indicating).

Q. What I asked you, Mrs. Lawson, was whether you used any pressure whatsoever to lift it up at all, and you said no, you didn't. A. No, it wasn't necessary to use pressure to do this (indicating).

Q. You just dragged it along the top of the box, is that correct? A. Yes, uh-huh.

Q. Well, then, how did the bottles get out of the box? A. I don't know.

Q. You don't know. A. It was so fast, I don't know. The only reason I know it was from underneath when the men they pick up this and the other four, they came out.

Q. But until that time, you didn't know what the reason was? A. No.

Q. In fact, you didn't notice whether or not the bottom was intact or not when this accident happened, is that correct? [29] A. No, only the bottles, they was—I heard the noise and I stayed there. I don't move. I don't move my hands. I don't move anything, because I wanted everybody to come and see for himself.

Q. And you left it right there, did you? A. Right there.

Q. After you pulled it towards you and you heard the noise, you left the six pack right there? A. Uh-huh.

Q. You didn't move it at all after you heard the noise? A. No.

Q. Now, do you know what the noise was? A. The explosion and the glass.

Q. But do you know what it was, what the noise came from? A. Yes, sir.

Q. What? A. It was from the bottles.

Q. From the bottle. Now, do you know where the bottle came from? A. From the package I had.

Q. Did you see the bottle fall from the package? A. No, I don't see—Only I see two bottles was missing there in the front.

Q. After you heard the noise? A. Yes. Until this time, I saw them.

[30] Q. After you heard the noise, you looked and saw that two bottles were missing? A. Uh-huh.

Q. But you never saw the bottle or bottles fall from that package, did you? A. No, this goes so fast and you can't take care always.

Q. That's right. A. If I know it was going to fell down, I pay attention.

MR. DOHERTY: That is all I have, Your Honor.

THE COURT: Is there any redirect?

MR. KARR: Just briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. KARR:

Q. Mrs. Lawson, you said it all happened very quickly? A. Oh, yes. It was in seconds, everything.

Q. When you first looked at the six pack, how many bottles were in it? A. In the carton?

Q. Yes. A. Six.

Q. And when you next looked at the six pack, how many bottles were there? A. Four.

Q. And it was in the space of a second when all this happened? [31] A. Yes. First, I thought it was only one bottle fall but I saw it was two missing.

MR. KARR: Thank you. No further questions, Your Honor.

RECROSS EXAMINATION

BY MR. DOHERTY:

Q. Mrs. Lawson, when you looked at the six pack, you saw six bottles in it; is that right? A. Yes.

Q. You are sure about that? A. Yes. I was going to pay for it. I know what I have.

Q. You are positive about that? A. Positive.

Q. But you don't know about a lot of other things, is that correct? A. Some things.

Q. Now, let me ask you this: Do you know how many bottles fell? A. First time, no. I hear only the noise. Later, I saw the two on the front, they not was there and I was sure it was two when the man he pick up the carton and four went.

Q. Now, you are sure that it was two that fell because of the fact that you saw six before and there were four left there? A. Yes, and later the two in the front, they wasn't [32] there.

Q. Now, you are sure that two fell out of the carton? A. Yes.

Q. Now, do you remember your deposition being taken on March 27th, 1969, last March? A. Yes.

Q. Now, on page 18 of that deposition, you gave the following answers to the following questions—This is at the top of the page:

"Question: But after the accident, after they fell, did you look at the floor to see if the bottles were there?

"Answer: Yes.

"Question: What did you see?

"Answer: Pieces of bottles.

"Question: Two broken bottles?

"Answer: I don't know if it was two. I saw there was not two in the carton."

Is that correct? A. Uh-huh, for the reason it was two—

MR. KARR: Objection.

THE COURT: Just a moment.

MR. KARR: To keep it in context, that should be finished because—

THE COURT: Well, you can do that on redirect. Each try your own case, gentlemen.

[33] MR. KARR: All right.

BY MR. DOHERTY:

Q. Did you give those answers to those questions? A. Yes.

Q. Now, at that time, you didn't know whether or not there were actually two that had fallen out, is that correct?

MR. KARR: I object to this, Your Honor, because he is mischaracterizing the testimony. He is not following through.

THE COURT: Just a moment. Mr. Karr, you can reexamine her on this. This is new material.

MR. KARR: Right, this is new material.

THE COURT: Well, this is cross-examination.

MR. KARR: Right, recross.

THE WITNESS: No, I don't see the two bottles fall down, no. The reason I know there was two because there was two missing, two in the front was missing in one second; and when the man came to pick up the carton, there was only four.

BY MR. DOHERTY:

Q. But at the time you took the deposition, you said you didn't know whether it was two that fell; is that correct? A. Perhaps I said that, yes. Like the same I say now. I don't know if it was one or two, huh, because this was in one second and in one second was several things.

Q. All right. You don't know whether it was one or two that fell, is that right? [34] A. Well, yes. At first time, I heard the noise of the bottle—I don't know whether it was one or two. After I saw the carton that there was the two in the front were not there. This is so fast and you have to expect to see all these things. It never happened to me, how can I pay attention?

MR. DOHERTY: That is all I have, Your Honor.

THE COURT: Now, Mr. Karr, do you want to examine?

MR. KARR: Yes, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MR. KARR:

Q. Let me finish this context of questions that you had testified to on deposition:

"Question: But after the accident happened, after they fell, did you look at the floor to see if the bottles were there?

"Answer: Yes.

"Question: What did you see?

"Answer: Pieces of bottles.

"Question: Two broken bottles?

"Answer: I don't know if it was two. I saw there was not two in the carton.

"Question: You don't know how many were on the floor, you assume?

"Answer: Because there were only four in the box.

"Question: And they come six to a carton?

[35] "Answer: Yes."

Did you make those statements? A. Yes.

MR. KARR: That is all I have, Your Honor.

THE COURT: Thank you, Mrs. Lawson. You may step down.

(The witness left the stand.)

* * *

[38] MR. KARR: Mr. McCoart, please.

Whereupon,

CHARLES CARROLL McCOART

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KARR:

Q. Mr. McCoart, will you tell us please, sir, your full name and your address? A. Charles Carroll McCoart. My address is 7909 Harwood Place, Springfield, Virginia.

Q. Mr. McCoart, where are you employed now, sir? A. At Giant Food Stores.

Q. At any particular store? A. At 3336 Wisconsin Avenue, Northwest.

Q. In what capacity are you employed there, sir? A. I am the store manager.

Q. Where you the store manager of that same store on September 16th, 1966? A. Yes, I was, sir.

Q. For how long, Mr. McCoart, had you been the store manager at that store? A. At that point, five and a half years.

[39] Q. So you have been there as manager for a total of about— A. About ten years.

Q. Almost ten years? A. Yes.

Q. Or at least nine years? A. Yes.

Q. Now, Mr. McCoart, do you remember on September 16th, 1966 seeing the plaintiff, Maria Lawson, at your store? A. Yes, I do.

Q. Do you have an independent recollection of that? A. Well, as far as recalling the exact dates, no; but I do recognize and I do recall Mrs. Lawson.

Q. Had you known Mrs. Lawson before that time? A. I can't honestly say. I feel that I did.

Q. You felt that she was a regular customer at your store? A. Yes.

Q. Mr. McCoart, on September 16th, 1966, what time did your store open? A. At nine o'clock a.m.

Q. Was that the regular opening time for your store? A. Yes, it was.

Q. Do you remember, Mr. McCoart, at what time the delivery was made that morning?

[40] MR. GRIMALDI: I object to that question, Your Honor. There has been no testimony that a delivery was made that morning.

THE COURT: Well, lay the foundation, Mr. Karr.

MR. KARR: Fine.

BY MR. KARR:

Q. Mr. McCoart, do you know whether there was a delivery made that morning by the Rock Creek Ginger Ale Company of carbonated beverages? A. I believe there was. I honestly can't recall, but this would be the regular practice.

MR. GRIMALDI: Your Honor, I object to that and move that it be stricken.

MR. KARR: Well, he is going by the practice and what he recalls, Your Honor.

THE COURT: He can testify as to the delivery practice.

BY MR. KARR:

Q. About what time in the morning, Mr. McCoart, was the delivery made if it was made that morning? A. Deliveries—I don't exactly recall the exact time. Deliveries could take place anywhere between eight in the morning and noon.

Q. All right. Now, do you recall, Mr. McCoart, how the particular [41] carbonated beverage called Blair House Soda was displayed at your store on September the 16th, 1966 between nine and nine-thirty, that is, between opening time and nine-thirty? A. I cannot exactly recall how it was displayed; I can explain what a display would appear to be, or the normal practice of placing the soft drinks on the counter for display.

Q. How were the soft drinks brought into your store? How were the carbonated beverages brought into your store?

Incidentally, when I ask you these questions, please limit your answers to the carbonated beverages that were delivered to you by the Rock Creek Ginger Ale Company, just in case there were other carbonated beverages delivered to your store by other distributors.

How were the beverages then delivered to your store by Rock Creek Ginger Ale Company? A. This is a very normal procedure and trying to limit it to one particular organization, it's rather difficult.

A delivery would be received at the back door, would be counted at the back door.

Q. By— A. By a receiver, someone would have to inspect—well, not inspect but count the number of units that would be coming in by case.

Q. One or your employees? A. Yes, sir.

[42] Q. Yes, sir. Very good. A. And from there, it would be wheeled out onto the floor.

Q. By— A. The Rock Creek representative.

Q. The delivery man for Rock Creek? A. Yes.

Q. All right. Then what would happen? A. It would be left in front of the display.

Q. On the floor? A. On the floor.

Q. In the aisle? A. In the aisle. This would be normal. There is nothing unusual about that.

Q. All right. No. That is fine. I understand that.

Now, addressing yourself specifically to six packs of Blair House Soda, six packs of 12 ounce bottles of Blair House Soda, throw-away bottles: How did they arrive at your store? They were packaged how? A. That particular soft drink would come as six packs, 4 six packs on a tray or in a box. The box would have no top on. That's why I say a tray.

Q. All right. It looked like a cardboard tray? A. Yes.

Q. And the 4 six packs would go right to the top of [43] that cardboard tray? A. Yes.

Q. And they would fill the cardboard tray. In other words, the cardboard tray was large enough to accommodate just 4 six packs? A. Yes.

Q. All right, sir. Now, once the Rock Creek Soda Company delivery man unloaded the trays of 4 six packs, 12 ounce bottles of Rock Creek soda, on the floor in front of the display counter, then what would happen to it? A. When you say "unload"—His entire load, as we refer to it, would not be case by case unloaded.

Q. All right. A. In other words, through experience, he would pull his truck from underneath the entire stack and that is what would be referred to as unloading.

Q. I see. He would leave the entire stack right there in the aisle? A. That is right.

Q. Okay. Do you know how many trays of these six packs he would stack up on the truck? A. I would have to approximate this.

Q. Sure. [44] A. A vendor could bring in as many as eight or ten in one load.

Q. On a truck? A. On a truck.

Q. Now, the truck, I gather, is a two-wheeled truck; is that right? A. Yes.

Q. With two handles? A. Yes.

Q. It's got two long handles and the cartons stack up back against the handles? A. That is correct.

Q. And he pushes this two-wheeled truck with– A. That's right.

Q. How many did you say, eight or ten trays? A. I would have to approximate. I feel I could carry eight on a two-wheeled truck.

Q. How high would eight be, using whatever type of measurement you might want? Use me, for example. Up to my chin? A. Possibly as high as this railing here (indicating).

Q. About as high as this railing? A. Yes.

Q. That would be eight stacked up? A. Yes.

Q. Eight trays of 4 six packs each stacked up on top of [45] each other? A. Yes, sir.

Q. Do you have a specific recollection of whether or not the Rock Creek Ginger Ale Company delviery man followed that standard practice on September the 16th when he delivered the Blair House Soda to your store? A. I would have no specific recollection–

MR. DOHERTY: Your Honor, I object to that. First of all, that is not evidence to show that he actually was there on that day.

MR. KARR: Well, Mr. McCoart said–

THE COURT: He said he has no recollection of it anyway, so the objection is pointless.

BY MR. KARR:

Q. Well, were you there that day, Mr. McCoart? Did you work that day? A. Oh, yes. I was there.

Q. Sure. A. You are asking me to recall, if I may, something that happened a number of years ago and I must assume–You asked if a delivery man was there and I must assume that there was a delivery made that particular day.

MR. DOHERTY: I object to that and move that it be stricken as not responsive.

THE COURT: Insofar as it reflects practice, I will [46] allow it. Insofar as it is a pure assumption, a pure conclusion, I will discount it; so limit it to practice since he has no definite recollection.

BY MR. KARR:

Q. Mr. McCoart, once the trays containing the 4 six packs of soda—in terms of general practice—were put on the floor in front of the display counter by the Rock Creek delivery man, how long did they stay on the floor as a normal thing? A. They would stay on the floor—they could stay on the floor 15 or 20 minutes waiting for a clerk to come along and then put them on display.

Q. And by putting them on display, what do you mean, sir? A. Taking them off of the trays. They would have to be priced. The clerk then would pick up a six pack and place it up on the counter.

Q. Now, what would he do with the cardboard trays at that point? Once he had emptied a particular tray of 4 six packs, what would he do? A. He would place it on the floor as close to the counter as he possibly could.

Q. The tray? A. The tray, yes.

Q. He would leave the empty trays in front of the counter? [47] A. Well, as he was unloading each six pack, he eventually would have a single tray that would be in the way of going to the next tray, so he could have to put it on the floor.

Q. Right. But would he ultimately, after he finished unloading each of the trays, discard those trays then? A. Yes.

Q. He would take them to the back? A. Yes. But if he were working the entire aisle, he would wait until he had a load of empties to take to the back.

Q. Oh sure. But he wouldn't leave the empty trays out there in the aisle, would he? A. Yes, he may. While he was working there, he certainly would.

Q. Right. When he finished working in the aisle, when he finished displaying the club soda or all of the sodas, he would then take the empty trays back and discard them; is that right? A. Yes.

Q. Is it conceivable to you, Mr. McCoart, applying again the standard that–

MR. GRIMALDI: Your Honor, I object to any question that has the word "conceivable" in it. That is not proper.

THE COURT: Yes. Reframe your question, Mr. Karr.

BY MR. KARR:

Q. Is it within a reasonable certainty to you, Mr. McCoart, [48] that trays containing 4 six packs of Rock Creek Blair House Club Soda could have stayed on the floor, on or around September 15th and September 16th, 1966, overnight?

THE COURT: Are these loaded trays or empty trays?

MR. KARR: Loaded trays, Your Honor.

BY MR. KARR:

Q. Is that possible?

MR. DOHERTY: Your Honor, I object to what is possible.

THE COURT: We don't want possibilities; we want to know either his definite recollection or the practice of the trade.

MR. KARR: Right.

BY MR. KARR:

Q. In terms of your practice, can you say with reasonable certainty whether or not–

THE COURT: Just ask him what was the practice.

BY MR. KARR:

Q. What was the practice? A. Normally the floor would have been clear as of Friday night, supposing that it were a Friday night. In other words, today being a normal work day as of 9 p.m. tonight, we would hope to have today's work done; and that would be a normal thing.

Q. Yes. All of those trays containing soda bottles [49] would be on display by the end of the work day, right? A. Yes.

Q. Now, in that connection until one of your store clerks reached into the tray and took out a six pack and put it on the display counter, until that time—in your normal practice—would any other store clerk have touched that six pack? A. No one would have occasion to, no.

Q. All right.

Before September 16th, 1966, did you have at your store in the five and a half years that you were there—Incidentally, were all five and a half years spent at that store on Wisconsin Avenue? A. Yes, they were.

Q. During your five and a half years as store manager, had you known of soda bottles to fall out of six packs?

MR. DOHERTY: Your Honor, I object to that. May we approach the bench?

THE COURT: Yes, surely.

(At the Bench:)

MR. DOHERTY: Your Honor, I am going to object to this. All these prior things, they have no basis or foundation for the particular incident that happened in this case.

The situation is this; There are some cases on this that go back to Schaffer v. Lehman, 2 MacArthur 305, which was [50] upheld in Randle v. United States, 72 Appeals D.C. 368, which I have Shepardized and in which particular case, it was an action for work done and it held that evidence that the plaintiff had done inferior or defective work on the house of another person was inadmissible.

This is exactly the same thing he is doing here.

THE COURT: This is not quite the same thing. This is the same kind of accident at the same premises under the same circumstances. That is what he is trying to get at.

MR. KARR: Right, for prior similar accidents.

THE COURT: You haven't laid a good foundation. You have gone to the conclusion. Lay a foundation as to similar accidents of similar circumstances of someone picking it up and it dropped out.

MR. KARR: Sure.

MR. DOHERTY: I am afraid what may come out would be inadmissible. If he wants to put on some sort of voir dire and see what the testimony will be—

MR. KARR: He has got it on deposition. He knows exactly what he is going to say, Your Honor.

THE COURT: I would think you would know what he is going to say. If you want to examine on voir dire, I will excuse the jury.

MR. DOHERTY: What are you going to bring out? I want to be sure of what is going to come out.

MR. KARR: It is in his deposition. He is going to say that periodically, this happened, that bottles fell out of cartons. You know that.

MR. GRIMALDI: Periodically.

MR. KARR: That's what he said in his deposition.

MR. GRIMALDI: Anything happens periodically.

MR. DOHERTY: It doesn't say anything about this specific type of club soda, or this particular type of carton.

MR. GRIMALDI: It doesn't say this happened with Rock Creek Ginger Ale club soda.

THE COURT: You have to limit it to the same circumstances.

(In Open Court:)

THE COURT: Would the jury retire for a few moments, please.

(Whereupon the jury retired from the courtroom at 2:30 p.m. and the following proceedings ensued:)

MR. GRIMALDI: Your Honor, would you like the witness excused also?

THE COURT: Yes.

Mr. McCoart, would you step out into the corridor for a few moments, please.

(The witness complied.)

MR. KARR: Your Honor, on page 18, as you will note at line 13, "Had you had any experience in the past—and by [52] the 'past,' I mean prior to September 15, 1966—with bottles falling out of cartons such as these?"

And I say, "This goes to the notice question."

Mr. Clague who was Mr. Grimaldi's colleague said, "Answer as best you can. That is all I can say."

The witness, "This does happen periodically."

They know exactly what he is going to say.

MR. GRIMALDI: Let me make an objection, Your Honor.

Your Honor, here is the situation: It's a curious thing Mr. Karr wants the Court to rule on this case, such as, a woman falls on an onion leaf in your grocery store—Did you ever have onion leaves fall off of onions on your floor before? Yes. Therefore, you are on notice that onion leaves are on the floor and people fall on them; therefore, you should not carry onions any more in your store.

MR. KARR: No, no.

MR. GRIMALDI: It's just not a good argument.

MR. KARR: That is not what I am saying. What I am saying is that if people fall on onion leaves and it happens periodically and the store does nothing either to warn people who are walking around onion leaves or to take some other corrective steps to insure that onion leaves are picked up when they are dropped, that can raise an inference of negligence and that sets the standard of care by which the store has to act with respect to its customers. That's all I am saying.

[53] MR. GRIMALDI: I don't feel that is fair, Your Honor. That's not the test of liability in this case. We are not arguing a motion for directed verdict at this time. I don't think becaues some-

thing happens once before, that the store should be on notice that it is likely to happen and they can't carry pop any more.

THE COURT: He does have a point. Let's say these cartons fell apart daily, day after day after day and the store was on notice that if you pick up a carton, it falls apart. The store ought to take steps not to use that type of carton, not permit it to be delivered to the store. That's what he is getting at.

MR. KARR: Or at least inspect it.

THE COURT: Inspect it before they use it, before the public can get at it.

MR. GRIMALDI: Well, Your Honor, there are about a million reasons why these cartons can come apart. We are not here to disprove his case—

THE COURT: I know, but this is part of your case on the proof through the experts. This is why I say it is a packaging deal. It is not a bottling deal; it is a packaging deal as to the tensile strength of this cardboard, and so forth, and what it will hold.

MR. GRIMALDI: Well, what's going to be the test as to how many times—

[54] THE COURT: I don't know. Put on your experts. I don't know how you are going to prove your case.

MR. GRIMALDI: No, no. I am talking about him now. He wants to prove his case through Mr. McCoart; and I want to know from the Court as to how many times Mr. McCoart has to know about this before we are on notice.

THE COURT: I don't know.

MR. GRIMALDI: Once, twice, several times over a ten-year period?

THE COURT: I don't know.

I think you ought to limit the period, yes. We don't even know how long these cartons have been in use or anything else.

MR. KARR: Right. I think it is a question of fact for the jury whether or not Mr. McCoart was on sufficient notice. Actually, the whole question of negligence is a question of fact for the jury, and an ingredient–

THE COURT: I do think you ought to limit your questions to the period when these particular cartons, this particular type of carton was in use if you know.

MR. KARR: Oh, fine. Sure.

THE COURT: But don't go back for the last sixty years and see if an accident ever happened in the store.

MR. KARR: No, no. In effect, I'll have him identify the cartons.

[55] THE COURT: And I want the accidental question limited to this type of carton containing this type of beverage.

MR. KARR: What I'll do, if the Court–

THE COURT: If you have got a couple of ginger ales out of somebody else's carton, that's something else.

MR. KARR: That's right. What I'll do is show him the carton at this point and limit it to experience with that type of carton.

THE COURT: Limit it very closely to this particular type of carton and within a reasonable time prior to this time.

MR. KARR: Sure. Well, I think he said he was at that store for five and a half years, so I think that is a reasonable time. If they used that carton for five and a half years, I think that ought to be reasonable.

MR. GRIMALDI: Well, Your Honor, I don't want to be obtuse. He doesn't know anything about these cartons.

THE COURT: He has got a right to prove notice.

MR. GRIMALDI: But they could have changed the carton the week before. He doesn't know that.

THE COURT: All right. I am limiting it to this particular type of carton.

MR. GRIMALDI: But Mr. McCoart doesn't know what carton was on the–

THE COURT: Well, if he doesn't–That is what I am [56] saying, lay your foundation. Then if he doesn't know what these cartons are about, then the questions are not asked. But if he says this particular type of carton has been in there ever since he has been in that store and there has never been any change so far as he knows, and that these cartons do fall apart if you blow at them, then he is on notice.

MR. DOHERTY: In any event, Your Honor, can we have this preliminarily out of the presence of the jury?

THE COURT: All right. Go ahead.

Bring in the witness.

MR. GRIMALDI: If he wants to prove that this carton was defective, Your Honor, because some other one was defective, that doesn't hold water.

THE COURT: That is why I say that he has got to prove that he has knowledge it is the same carton.

You have got to establish that it is the identical carton to compare it, not just by color and feel and weight. You ought to put on experts. This is no way to do it.

MR. KARR: Well, the only way to do that, Judge, is to do it through the witness we have under subpoena. That's Mr. Malinick. The only person who knows–

THE COURT: All right. The put Mr. Malinick on. What does this man know about glue and tensile strength, and so forth?

MR. KARR: Well, let's ask him. Let me ask him.

[57] Whereupon,

CHARLES CARROLL McCOART

resumed the witness stand, was examined and testified further as follows:

DIRECT EXAMINATION (Resumed)

BY MR. KARR:

Q. Let me show you this six-pack carton, Mr. McCoart, marked Plaintiff's Exhibit No. 1 in evidence. Do you know for how long Blair House Soda was delivered to your store in a carton identical to that and a packaging identical to that?

MR. DOHERTY: Prior to the accident.

MR. KARR: Well, of course.

THE WITNESS: I would have no way of recognizing when a type of carton had been used in the store. This looks like a relatively normal type of packaging for this type of beverage.

BY MR. KARR:

Q. Do you know the different ways in which six packs are packaged, that is, six packs of 12-ounce bottles? A. Many are like this. Some are completely open with a handle. Some have plastic that you would pick up.

Q. Okay. A. I'm sorry if I—

Q. No, that's all right. That's okay.

* * *

[90] BY MR. KARR:

Q. Now, Mr. McCoart, again addressing yourself, if you will, sir, to Plaintiff's Exhibit No. 1, the six-pack in front of you, have you had any experience in the past—and by "the past", I mean prior to September 16, 1966—with bottles falling out of cartons such as that?

MR. DOHERTY: Your Honor, I am going to object to [91] that.

THE COURT: No. I will permit it. You have your exception. Go ahead. Limit it in point of time.

MR. KARR: Yes, sir. Prior to September 16th, 1966.

THE COURT: Well, I think we limited it to three years prior.

MR. KARR: That is right, Your Honor.

BY MR. KARR:

Q. Three years, from September 16th, 1963 to September 16th, 1966. Do you understand the question, Mr. McCoart. A. I do. Once again, these dates and trying to remember exactly what took place within these dates is very difficult.

Q. Oh, sure. I understand that. A. As this carton sits here now, I do not recall anything ever falling out of a carton the way this carton is right now. I can do pretty much to that carton (demonstrating); but upon someone—and I won't—lifting and tearing this and removing one bottle, it is possible for a bottle to fall out. That has happened. People have picked this carton up and it has fallen off their finger, the contents has hit the floor and I have had problems.

People will pick up a six-pack of coca-cola and drop it. This does happen.

[92] Q. Mr. McCoart, have you had any experience with bottles falling out of cartons such as that during that three-year period? A. When this is placed back after breakage into the wetness of the broken bottle, yes, there is a possibility of this—

Q. Not possibilities; your experience, sir. A. Yes, I have come along and I have picked it up and another bottle has come through the wetness.

Q. With what frequency, Mr. McCoart?

MR. GRIMALDI: Your Honor, I am going to object to Mr. McCoart stating the frequency.

THE COURT: I will permit it. You have your exception.

MR. GRIMALDI: Your Honor, May I just for the record—He has indicated wetness. There has been no testimony in this case as to wetness of that carton.

THE COURT: I know, there has been no testimony as to wetness. I will permit it.

BY MR. KARR:

Q. You may answer the question, Mr. McCoart. A. You are asking me how often would one of these break if it were wet?

Q. No. I am asking you, within your experience during the three-year period we have mentioned, September 16, 1963 to [93] September 16, 1966, referring to Blair House Club Soda, with what frequency have you seen the bottles fall out of Blair House Club Soda cartons? A. I don't ever recall Blair House as such having that problem.

Q. "Having that problem" meaning you don't recall Blair House as such? A. I don't remember a six-pack carton of this type breaking and something falling out of it.

Q. Within that three-year period, is that correct? A. Once again, I have to say I am trying to recall something in that specific time. We have had soft drinks break, but I can't say that they were Blair House.

Q. Mr. McCoart, do you recall being in my office to give testimony in connection with this case on August 12, 1968? A. Yes, I do.

Q. We were at that time, were we not, Mr. McCoart, discussing Blair House Club Soda? A. Yes, we were.

Q. Twelve-ounce bottles in six-pack cartons? A. Yes, we were.

Q. Do you remember being asked, Mr. McCoart–

THE COURT: Don't impeach him. He is your own witness. See if you can refresh his recollection with it.

MR. GRIMALDI: What page are you referring to?

[94] BY MR. KARR:

Q. Would you read page 18, Mr. McCoart, and see if this will refresh your recollection in terms of the questions that have now been asked you? Start, Mr. McCoart, if you would, at line 13 and go down to line 19. A. (Witness perusing transcript.) Yes. If this is the testimony, this is what I said.

Q. Does that refresh your recollection, having read those lines? A. Yes, it does.

Q. Having refreshed your recollection, let me ask you again about your experience prior to September 15, 1966 and confine yourself, if you would, sir, to a three-year period, with bottles falling out of cartons such as this? Did it happen? A. The way that I answered that question does not specifically mean this type of carton. This carton, to the best of my knowledge, was not present the day I made that testimony. We were talking about cardboard cartons in general.

Q. Mr. McCoart, weren't we talking about a carton of Blair House Club Soda, the bottles having fallen out?

THE COURT: Look, don't argue with the witness. Ask questions and get answers.

BY MR. KARR:

Q. Wasn't your understanding, Mr. McCoart, that we were [95] talking about a six-pack carton of Blair House Club Soda out of which a bottle or two fell and injured Mrs. Lawson? Wasn't that your understanding? A. May I read that again?

Q. Surely. (Transcript handed to the witness) A. The answer to this is yes.

Q. Well, now the question is this, Mr. McCoart—The question that is being asked, is that the question you are answering? A. Ask your question again, please.

Q. The question was: What was your experience during the three-year period before September 16, 1966 with respect to bottles falling out of cartons? A. On occasion, there have been bottles fall out of cartons such as these.

Q. Periodically? A. Periodically.

Q. "Periodically" is your word? A. How often is periodically, now?

Q. I don't know. What did you mean by that, Mr. McCoart, when you said "periodically"? A. We have—if I am out of line in answering this—we have 18,000 people come through my store every week. If this happens periodically once a week or twice a week, that is what I mean by "periodically."

[96] Q. Once or twice a week? A. That is correct.

Q. That's over the three-year period to September 16th, 1966, right? Is that your estimate? A. Yes, that would be an estimate.

Q. Now, Mr. McCoart, where was Mrs. Lawson—First of all, let me ask you a general question: Do you have an independent recollection, without having read your deposition, of what happened on the morning of September the 16th, 1966? A. Yes, I have an independent recollection. We are talking about a number of years ago.

Q. Yes, sir. A. Would you like me to recall that?

Q. Well, I shall ask you questions about it and I would, yes, very much like you to recall that.

Did you review your deposition before you came down here? Did you read it? A. Yes.

Q. That was when, a day or two ago? A. It was, yes.

Q. Now, by your deposition, I mean this book of transcript of testimony, right? A. Yes.

Q. The one from which you were just reading. A. Yes.

[97] Q. On September 16th, 1966, do you remember about what time it was that you went to Mrs. Lawson's assistance? A. Approximately ten-thirty or eleven in the morning.

Q. How was your attention invited to that fact that Mrs. Lawson needed assistance? A. I had been called that someone had been hurt.

Q. Where did you go when you were told that? A. I immediately went to the soft drink aisle where I had been instructed that there had been the accident.

Q. The soft drink aisle? A. Yes.

Q. Do you have a specific recollection of seeing Mrs. Lawson in that soft drink aisle? A. Yes.

Q. Where was she, standing or sitting or what? A. I believe at that time, she was standing.

Q. Standing where? A. In the middle of the aisle.

Q. Did she have anything in her hands? A. I don't recall.

Q. Did she have a basket of food nearby? A. Yes.

Q. Where was the basket of food? A. I don't recall.

Q. Was she carrying a purse? [98] A. I don't recall.

Q. How long was she standing there at the time that you arrived? How long did she stand there after you arrived in the soft drink aisle? A. How long had she been standing there prior, or after?

Q. After you arrived, how long did she remain standing in the soft drink aisle? A. I believe that upon my coming into the aisle, I tried to sit her down onto some cases of merchandise that were there at the time, I believe.

Q. Cases of carbonated beverages? A. I can't recall that.

Q. But they were cases of some sort? A. They were in the soft drink aisle. I assume that they were soft drink cases.

Q. On both sides of the aisle, were there soft drinks? A. I don't recall.

Q. How long did Mrs. Lawson remain standing after you arrived? A. I immediately tried to sit her down.

Q. And did she sit down? A. Yes, she did.

Q. It was on the floor, wasn't it? A. She very well could have sat on the floor. I don't recall now.

[99] Q. And you sat down right next to her, didn't you, to help her? A. I tried to assist her, yes.

Q. You sat down next to her in your effort to assist her, right? A. I don't recall.

Q. Didn't you send somebody out for smelling salt? A. Yes, I did.

Q. And who was that? A. The person's name, I don't recall. There were several people with me and we were all interested in helping Mrs. Lawson.

Q. How long was it between the time that you first came to Mrs. Lawson's assistance and the time that you called for the ambulance? A. I can't recall that. We did it within—We had to determine that there had been an accident and shortly after that, we had to ask for assistance and we did that.

Q. Was it, say, within 15 minutes? A. Definitely, I would say it would be within 15 minutes.

Q. And did you, yourself, call for the ambulance? A. That I don't recall.

Q. How long after the ambulance was called for did it arrive, ten or fifteen minutes more? [100] A. I don't recall. We were very wound up at that time trying to take care of someone that had been hurt, and we were not taking time counts at all. We were interested in getting Mrs. Lawson comfortable and making sure that she isn't going to pass out or something like that.

Q. Did you examine the injury? A. I did see the injury, yes; and upon seeing it, at that time I immediately decided she needed help.

Q. Why was that that it appeared to you she needed help? A. Because she had been cut.

Q. Did it appear to be a serious injury to you? A. Yes.

Q. Now, Mr. McCoart— A. More serious than I could offer first aid for. Now, I don't know how serious it would have been.

Q. Well, you did offer some first aid, did you not? A. I believe we bandaged her foot.

Q. And you gave her some smelling salts? A. Yes.

Q. Okay. How was she taken from the store? A. I don't recall.

Q. Where was she taken from the store? A. Where was she taken from the store? I'm sorry, Mr. Karr, which do you mean, out to a waiting ambulance or–

Q. No. Do you know what destination she was taken? [101]

MR. GRIMALDI: Your Honor, I object. I think we are getting into irrelevant and immaterial on some of these questions that are being asked of this witness.

THE COURT: He is entitled to ask them, but I should think you could stipulate a lot of this.

MR. GRIMALDI: He has already gone over all of this testimony with the plaintiff and now he is asking this witness.

THE COURT: Well, he has a right to ask the questions if he wants to. It is repetitious.

BY MR. KARR:

Q. Do you know where the destination was? A. We normally ask the ambulance driver to take the person to Georgetown Hospital. That has been our general practice, to get the person to the hospital as soon as possible.

Q. Whenever they are injured in your store? A. Yes.

Q. Now, Mr. McCoart, did you remove a six-pack carton from the area in which Mrs. Lawson was injured? A. Yes, I did.

Q. Did you do that yourself? A. I don't recall if I did that myself.

Q. Was it removed before or after Mrs. Lawson had left the store to go to the hospital? A. That would ahve been removed after Mrs. Lawson left. Mrs. Lawson came first, and then we would try to clean up the [102] general area and that carton would have been saved at that time.

Q. Saved because it had caused an injury?

MR. GRIMALDI: Your Honor, I object to that question.

BY MR. KARR:

Q. Well, why was it saved, Mr. McCoart?

MR. GRIMALDI: I object to the question, Your Honor.

THE COURT: I will permit it. Go ahead.

THE WITNESS: Well, if someone is hurt, we would save a carton or we would save a can, whatever.

MR. KARR: Now, there is one point that we raised this morning, if the Court please. Again, I think the Court would prefer me to approach the Bench.

THE COURT: Will you come to the Bench, gentlemen.

(At the Bench:)

MR. KARR: We have Mr. McCoart's deposition and on deposition, Mr. McCoart testified he had prepared two statements in connection with Mrs. Lawson's injury, one of which he sent to Traveler's and the other one I think he sent to Giant, or maybe both went to Traveler's. I am sure we can subpoena them.

I think it would save the Court a lot of time if counsel for the defendant would produce them at this point before we close MR. McCoart's direct examination—

THE COURT: Again, this is going to be impeachment purposes.

[103] MR. KARR: I don't think so.

Mr. McCoart prepared them contemporaneously with the accident. These statements will help him refresh his recollection.

THE COURT: It is for purposes of refreshing his recollection?

MR. KARR: Yes, because they were prepared contemporaneously—

MR. GRIMALDI: Under no circumstances am I going to reveal my file. He knows discovery procedure, Your Honor. He could have filed a motion for production up until the time the case was placed on the ready calendar. He didn't do that. He is trying to present a criminal case.

The man said on the stand he had an independent recollection of the events. He doesn't need—

MR. KARR: He has testified he can't recall—

MR. GRIMALDI: Quit pushing yourself in this case. I want to finish–

THE COURT: Just a minute. I will excuse the jury.

(In Open Court:)

THE COURT: Ladies and gentlemen of the jury, we will reconvene at ten o'clock tomorrow morning.

Remember my admonition: Do not talk to anyone about the case, and do not let anyone talk to you about it.

It would be appreciated if you would come in a few [104] minutes before ten and convene in the jury room so we can make certain that everyone is here.

Good night.

(Whereupon, at 3:55 p.m., the jury left the courtroom and the following proceedings ensued:)

MR. KARR: I think the witness should be excused also, Your Honor.

THE COURT: Yes.

I think, Mr. McCoart, we will have to excuse you too until tomorrow morning. Would you be sure to be here at ten o'clock?

THE WITNESS: Yes, sir.

(The witness left the courtroom.)

MR. KARR: Mr. McCoart testified on deposition that he had prepared two separate statements. I am looking now for the reference in his deposition.

I don't think that is contested, Your Honor. I think both defense counsel will agree that he prepared and submitted two statements.

The limited purpose for which we want to use them at this point is to see if we can help Mr. McCoart refresh his recollection on elements that are critical and focal to the development of the case in terms of his recollection about where Mrs. Lawson was, where the carton was, what he did. He can't recall any of these things.

[105] THE COURT: Isn't that in his deposition?

MR. KARR: Some of it is; some of it isn't.

THE COURT: Well, why don't you use the deposition?

MR. KARR: Well, because he didn't have a lot of recollection at the deposition either. He made two statements contemporaneously with the occurrence.

THE COURT: What I can't understand is the way you are using these witnesses. You put him on as your witness.

Now, is this going to be impeachment?

MR. KARR: No, it's going to be—

THE COURT: Even in a criminal case, that is the only reason why we let the Jencks Act statements in.

MR. KARR: Well, it's going to be a refreshment of recollection is what it's going to be. Again, if the Court please—

THE COURT: I don't think you have a right to call upon them unless you are going to impeach this witness. I'll let you make him an adverse witness, a hostile witness, if you think that is the proper procedure since he is on the other side.

MR. KARR: I don't want to—

THE COURT: And then if you are going to impeach him, all right, I will let you use the statements; but if you are going to treat him as your witness and vouch for his credibility, you are not entitled to those statements.

[106] MR. KARR: Again, the purpose for my using the statements or asking for the statements— Again, understand I am using all defense witnesses to prove my case. I have to do that in a case like this because there is no direct testimony available from plaintiff's witnesses other than the testimony from the plaintiff herself and from her physicians.

THE COURT: The only way I will permit you to do it is to qualify him as an adverse witness and then I will order the statements produced for impeachment purposes only.

MR. KARR: We don't know if there is—

THE COURT: And if there is no impeachment material in there, you won't be permitted to use them.

MR. KARR: Well, okay. Fair enough.

THE COURT: As long as these statements are not in your hands, other people have a perfect right to their own records and so forth and so on. I am not going to order them produced simply for refreshment purposes.

MR. KARR: Well, fair enough. We don't know whether the statements contain contradictory—

THE COURT: Well, how are you proceeding? Are you going to qualify him as an adverse witness and then impeach him, or are you going to treat him as your witness and vouch for him?

MR. KARR: The dilemma on the horns of which I am trying to get off is that the witness has testified, "I don't [107] recall in answer to—

THE COURT: Well, you have got his deposition. I think you have to be satisfied with it unless you are going to qualify him as an adverse witness.

MR. KARR: No, because if the statements that he made himself—In the deposition, he said that he didn't have copies of the statements. He didn't remember—

THE COURT: You show me the authority for producing it in the morning and I will have them produced. You have to show me some authority.

MR. KARR: All right, Your Honor.

(Whereupon, at 4:00 p.m., the trial in the above cause was adjourned until 10:00 a.m. on Wednesday, January 14, 1970.)

* * *

Wednesday, January 14, 1970.

[118] CHARLES CARROLL McCOART

the witness on the stand at adjournment, resumed the witness stand, was examined and testified further as follows:

DIRECT EXAMINATION (Resumed)

BY MR. KARR:

Q. Mr. McCoart, you told us yesterday that the store opened at nine on the morning of September the 16th, 1966, right? A. Yes, sir.

Q. Nine o'clock on Friday morning, September the 16th? A. Yes, sir.

Q. Now, at that time, Friday morning, September the 16th, how many employees did you have in the store? A. We would have—this would have to be approximate—approximately 50 people in the store.

Q. Employees, sir? A. Yes.

Q. Of those 50 people, how many of those 50 were responsible for stocking merchandise on the display counter? A. There would have been one person assigned to display that particular—the display in question, there would have been one person assigned.

Q. One person in 50 assigned to do the carbonated beverages display, right? [119] A. Plus other items.

Q. All in the same aisle? A. In other aisles, also.

Q. All right. Now, at what hour did that one person come to work that morning? A. Once again, this would have to be approximate. Approximately 8 o'clock.

Q. All right. What time did the other 49 employees come to work that morning? A. Once again, this would be approximate. Beginning at 6:00 a.m.—

MR. GRIMALDI: Excuse me.

Your Honor, Dr. Eisenberg is out in the hallway. It would be appreciated if he could be taken out of turn.

MR. KARR: Dr. Eisenberg, good. I won't be much longer.

BY MR. KARR:

Q. You may continue, Mr. McCoart. A. Beginning at 6:00 a.m., there would have been a certain number of people; 7 o'clock, there would have been a certain number; and 8 o'clock, right on throughout the day up until that particular time of the accident. There would have been approximately 50.

Q. Of the 50, including the one person you have mentioned who was in charge of that display, how many of the [120] 50 people were responsible for stocking other merchandise on display stands? A. There would have been eight others.

Q. A total of nine? A. Yes.

Q. All right.

Now, you told us yesterday that you had a process of stamping the price tags on these six-pack cartons of Blair House Club Soda? You told us that, didn't you? A. Yes, I believe I said it would have been priced and put on the sales floor.

Q. Right. Priced and put on the display shelves, is that right? A. That is correct.

Q. Is that the time at which that merchandise was officially offered for sale, at the time it was stamped with a price tag and put on the display shelf? A. No, sir. It would not be officially for sale until it was put on the display counter itself.

Q. All right. So that those trays containing 4 six packs were not officially for sale while they were standing in the aisle, is that right? A. That is correct.

Q. Did you have a sign on them indicating that? A. No, sir, there would be no sign indicating that.

[121] Q. Did you have an employee standing by to tell the customers that that merchandise was not officially for sale? A. No, we did not.

Q. Mr. McCoart, can you tell us what the temperature, that is, the Fahrenheit temperature inside your store was if you know, or what the standard temperature was inside of your store on September 16th, 1966? A. We would hope to keep it at 70 degrees.

Q. Seventy degrees? A. Yes.

Q. And did you generally keep it pretty close to that? A. Yes.

Q. You testified yesterday about incidents involving bottles falling from cartons and you gave us some approximation of how often that occurred and what frequency. When that occurred, would you make a report to the bottling company whose bottle was involved in the incident? A. Normally, we would not.

Q. Well, have you from time to time? Did you from time to time back then? A. I would have no occasion to.

Q. You don't remember having done so? A. I have never made a report to a bottling company other than calling to the attention of the vendor that he had merchandise that was damaged. It would not be an official [122] report; it would be a verbal complaint that we had had breakage.

Q. By "the vendor," you mean the delivery man? A. Yes.

Q. The vendor, actually, in this case was Rock Creek Ginger Ale Company, right? A. This would not be a complaint to him. There is a procedure by which we receive credit for broken merchandise.

Q. What I want to clarify is when you use the word "vendor," you are not talking about somebody other than Rock Creek Ginger Ale Company, are you? The vendor in this case was Rock Creek Ginger Ale Company, right? A. We refer to delivery men as vendors.

Q. Good. And the delivery man in this case was an actual employee of Rock Creek Ginger Ale, is that right? A. Yes. But I cannot say specifically I had ever gone and said that we had broken merchandise.

MR. KARR: I think that is all we have. Thank you, Mr. McCoart.

THE COURT: Did you say there was a doctor out there waiting to take the stand?

MR. KARR: Yes, there is. Dr. Eisenberg.

THE COURT: Would it be agreeable to interrupt this witness and take the doctor?

MR. KARR: Fine.

[123] THE COURT: Would you mind stepping down for a few minutes, Mr. McCoart.

(The witness returned to the witness room.)

* * *

(Whereupon, the testimony of Dr. Sanford Eisenberg was reported but not made a part of this record.)

* * *

Whereupon,

CHARLES CARROLL McCOART

resumed the witness stand, was examined and testified further as follows:

CROSS EXAMINATION

BY MR. GRIMALDI:

Q. Mr. McCoart, a couple of questions directed to your direct testimony about the bottles that broke: As I understand it, your testimony was that approximately once a week, you would have a broken bottle problem, is that correct, in your store? A. That would be correct.

Q. And so that we clarify the record here, this would be from a number of sources, is that correct, various reasons why the bottles would be broken? A. That would be correct.

Q. Can you state with any specificness at all as to whether or not during the five years that you have been at the [124] store

whether you can recall that any carton of Rock Creek Ginger Ale came loose and bottles fell out onto the floor and broke? A. Specifically, no.

Q. And under your normal procedure, Mr. McCoart, when is an inspection of the cartons made after they are delivered to the store? I am talking about six-pack cartons, those that are put on the shelves. A. At the time that the clerk would remove them from the cardboard tray that the 4 six packs are in, at that time they would be inspected and put on the shelf.

Q. Are the clerks instructed at any time to open these cartons or anything before putting these cartons on the shelf, and look at them? A. Yes, well that would be normal procedure. You are putting good merchandise on the shelf.

Q. So the ladies and gentlemen of the jury understand, then each clerk is instructed to look at the merchandise before he places it on the shelf? A. Yes.

Q. And at that time if they find something broken in the carton, and what not, they make a note of it and tell the vendor and you would later be credited for it, is that correct? A. That is correct.

Q. Now, you also mentioned there are some 18,000 people [125] who come in the store every week? A. Yes, sir.

Q. Has it been your experience in the past to notice that people would go in and remove single bottles out of six-pack cartons? A. That is a very common occurrence, yes.

Q. Is this one of the explanations as to why bottles fall out of cartons? A. That would be, yes.

MR. GRIMALDI: I have no further questions, Your Honor.

BY MR. DOHERTY:

Q. Mr. McCoart, one question: Did you examine this particular carton after the accident? A. I do not specifically recall. No, I don't.

Q. You don't recall? A. No.

Q. To refresh your recollection, let me show you this deposition on August 12th, 1968. Do you recall having your deposition taken? A. Yes, sir, I do.

Q. I guess the best thing to do is maybe start down at line 20 on page 16 down to about line 9 on page 17. If you would just read that over, sir. A. (Perusing document.) Yes.

[126] Q. And also on page 10, line 2 through 4. A. (Perusing document.) Yes, sir.

Q. Does that refresh your recollection as to whether or not you had inspected this particular carton? A. Yes, I had inspected that particular carton.

Q. All right, sir.

Did you find that the carton was intact? A. Yes, the carton was intact.

MR. DOHERTY: Thank you.

That is all I have, Your Honor.

THE COURT: Is there any redirect, Mr. Karr?

MR. KARR: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. KARR:

Q. Mr. McCoart, didn't you tell us yesterday that you had reviewed your deposition a couple days ago? A. I had scanned through the deposition.

Q. And did you say, on Mr. Grimaldi's examination, that you don't recall having examined this particular carton? I gather you meant the particular carton out of which these bottles fell, right?

MR. GRIMALDI: Your Honor, I object. That was not on my examination. I didn't ask him that.

MR. KARR: I have the question, "Did you examine this particulr carton? I don't recall." Wasn't that the [127] question?

MR. GRIMALDI: That wasn't my question.

THE COURT: That was Mr. Doherty's question.

MR. KARR: Oh, I am sorry. Mr. Doherty's question. I am mixed up.

THE COURT: And he just refreshed his recollection.

MR. KARR: Right.

THE WITNESS: I don't understand your question.

BY MR. KARR:

Q. Didn't you say, "I don't recall" when you were asked, "Did you examine this particular carton?" A. I evidently did say that.

Q. Just now, didn't you say that when Mr. Doherty asked you that question? Didn't you say, "I don't recall"? A. No, I did not say that. I said I did recall upon reading the deposition here just a moment ago that I did recall examining that particular six-pack carton.

Q. I believe you told us yesterday, did you not. Mr. McCoart, that up until the time Mrs. Lawson was taken away by the ambulance, your entire attention was devoted to assisting Mrs. Lawson because she was injured? Is that right?

MR. GRIMALDI: Your Honor, I object to Mr. Karr impeaching his own witness here. The deposition speaks for itself and so does his testimony on the stand.

THE COURT: In any event, aren't you opening up new [128] fields now?

MR. KARR: I don't believe so. This goes directly to the question of whether or not Mr. McCoart examined the carton.

MR. GRIMALDI: He is impeaching his own witness Your Honor.

MR. KARR: No, I am not.

MR. GRIMALDI: You certainly are.

THE COURT: Let us see where he is going.

Go ahead.

BY MR. KARR:

Q. Isn't that right, Mr. McCoart? A. I still do not understand your question, Mr. Karr.

Q. Didn't you tell us yesterday that until the ambulance came and took Mrs. Lawson away, that you addressed all of your attention to Mrs. Lawson because you thought she was hurt? A. I believe I did say that, yes.

Q. All right. And that it wasn't until after Mrs. Lawson was gone that you took the carton or had someone else take the carton back to your office, right? A. Yes, that would be correct.

Q. And you don't recall whether or not you did or somebody else did, right? A. Take it to the office?

[129] Q. Yes. A. I don't recall at this point.

Q. The carton that was taken to your office was ultimately given to Mr. Grimaldi, your attorney; is that correct, sir?

MR. GRIMALDI: Your Honor, I am going to object to that.

THE COURT: What is the objection?

MR. GRIMALDI: This is redirect examination, Your Honor. I don't know what he is getting into now.

THE COURT: I don't either.

MR. KARR: Your Honor—

THE COURT: Would you come to the Bench. Don't argue in front of the jury.

(At the Bench:)

THE COURT: Are you opening up a new line of inquiry?

MR. KARR: Yes. We moved to produce the carton that Mr. McCoart has just now testified he picked up or had somebody else pick up and take into his office.

The Court signed an order. It was ultimately produced at the time of pretrial.

Now, Mr. Doherty asked Mr. McCoart on cross-examination whether or not he had examined a carton and whether or not the carton he examined was intact. Mr. McCoart said, yes it was.

[130] I am asking Mr. McCoart about the exact same carton which he said was intact, whether his attorney has that carton; and I am going to show him the carton Mr. Doherty has just asked him about and ask him if it's the carton.

MR. GRIMALDI: I object. Just because there's 18,000 pieces of evidence doesn't mean it all goes in.

MR. KARR: I don't know what the legal objection is.

MR. GRIMALDI: He said the carton was intact. What is the relevancy?

MR. KARR: Because it is not intact. It has been taken apart and folded.

MR. GRIMALDI: You are going to bring this out on redirect examination? I object to it.

MR. KARR: I did not bring out on direct examination the question of the carton that Mr. McCoart examined because we know that that is not the carton that contained the bottles that Mrs. Lawson had.

THE COURT: How is he going to identify it anyway?

MR. KARR: He Put his initials on it.

THE COURT: Is that the same one you have?

MR. GRIMALDI: I don't know. He just tells you he wants to produce something.

MR. KARR: There is an order for the production of the carton involved.

MR. GRIMALDI: He used a new carton in the beginning [131] of the trial. Now he wants to produce another one.

THE COURT: Well, let him produce it if it is the one that was involved in the accident.

MR. GRIMALDI: Wait a minute. He just got done telling the Court this wasn't the carton.

MR. KARR: Will you stipulate to that?

MR. GRIMALDI: I am past stipulating. He wants to get my file in and this carton over here—He is making it look like a big case and I object.

THE COURT: Was that carton marked at pretrial?

MR. KARR: Yes, it was.

THE COURT: If it was marked at pretrial, you produced it at pretrial.

MR GRIMALDI: Yes. Just so my record is clear, the plaintiff has stipulated he doesn't believe this was the carton used; secondly, he wants to introduce another carton and he wants the witness to identify that this was not the carton. I object.

THE COURT: It was brought out on cross-examination that he examined it and it was intact.

MR. GRIMALDI: Counsel doesn't believe this counsel and is asking the jury to look at it. I think it really is ridiculous.

THE COURT: If it was marked at pretrial, produce it.

MR. DOHERTY: I don't know what he had got in mind, [132] but it appears to me he is going to attempt to impeach this man.

MR. KARR: I am not going to impeach him. I am going to ask him if it was the carton brought back to his office. I was satisfied to leave it alone because there is an ambiguity in terms of this carton but on cross-examination, the defendants raised it.

MR. GRIMALDI: Wait a minute. Your Honor—

THE COURT: I have never tried a case in which I have been so lost.

MR. GRIMALDI: Because the plaintiff is blowing smoke, and you have to realize this—

THE COURT: Wait a minute. You are going to produce the carton. He is going to say yes, that is the carton that was brought back to his office. He is going to identify his initials.

MR. KARR: Yes. What has happened is he took it apart to fold it.

THE COURT: Then he will testify, I folded it up. Is that correct?

MR. GRIMALDI: I am not going to stipulate in this case. He just got done saying it was not the carton.

THE COURT: You just said a minute ago you are going to prove this is not the carton he identified. Now you say you are going to prove this is the carton.

[133] MR. KARR: No. What I said was this: He has testified he ordered to be taken back to his office, or he took it back himself, a carton from that aisle. He has just now testified that the bottom was intact on that carton that he ordered to be taken back to his office, a plain implication it was the carton that the bottles were in. It is directly contradictory to the plaintiff's testimony that when the bottles fell, the six-pack carton was in the tray and she left it there.

He also testified that it was only after Mrs. Lawson was taken away in the ambulance that they addressed their attention to taking the carton back to his office and cleaning up the area.

THE COURT: She testified there was only one six pack carton in the tray.

MR. KARR: Yes. They know Mr. McCoart testified on deposition that he picked up a six-pack carton from the floor and that was the six pack that had an intact bottom.

They also know that Mrs. Lawson testified this thing was in the tray. Someone was mistaken. They have the wrong carton. They have a carton which is detached. That is not an intact carton, a That is not an intact carton, a disassembled carton.

I didn't intend to raise it because I didn't think the testimonial conflict was useful to our case. They have introduced it in their cross-examination, so I want to show [134] this witness the carton.

THE COURT: All right. It is folded up, and they have to account for the folding.

MR. GRIMALDI: This is what I am objecting to. It is going to make McCoart out to be a liar.

THE COURT: You are going to have to produce somebody to say, we took it apart.

MR. GRIMALDI: How can we do that?

THE COURT: His initials are on it.

MR. DOHERTY: Mr. Karr held that all he is going to ask is whether this is the one and that he is not going to go any further. I don't think he should be permitted to impeach the witness.

THE COURT: You are not going to impeach the witness, are you?

MR. KARR: I am not going to impeach him.

THE COURT: Produce the carton.

MR. GRIMALDI: The carton was made a motion to produce to look at and inspect.

THE COURT: It is still relevant if he says he identified the carton and initialed it. It should have been submitted for expert analysis.

MR. KARR: We took an expert over there to see it—

MR. GRIMALDI: Don't give me this sort of thing. I don't want the Court to get the impression we didn't comply [135] with the order.

THE COURT: Produce what was marked at pretrial and let him ask the question.

(In Open Court:)

MR. KARR: Your Honor, may this be marked as Plaintiff's Exhibit 16 for identification?

THE DEPUTY CLERK: Plaintiff's Exhibit No. 16 marked for identification.

(Folded carton was marked Plaintiff's Exhibit No. 16, for identification.)

BY MR. KARR:

Q. Mr. McCoart, let me show you Plaintiff's No. 16 marked for identification. Would you examine that, please, sir? A. (Perusing exhibit.) Yes, sir.

Q. Is that the carton that you took back to your office or ordered somebody else to take back to your office after Mrs. Lawson was taken to the hospital? A. This would be the carton.

MR. KARR: I move its admission in evidence.

MR. GRIMALDI: Well, Your Honor, we object for the reasons stated at the Bench.

THE COURT: Wait until they cross-examine.

Do you want to cross-examine on this?

MR. GRIMALDI: I want to ask him a couple questions [136] on this, yes.

RECROSS EXAMINATION

BY MR. GRIMALDI:

Q. Now, Mr. McCoart, so we get the record straight: How do you know that this is the carton, just so the ladies and gentlemen of the jury will know? A. (Perusing exhibit.)

Q. Is there some way you can identify that this was the carton involved in this accident with Mrs. Lawson? A. On the morning of the accident, we saved the carton.

Q. How do you identify it? This is what I am trying to find out. A. I cannot honestly identify this as the carton. We forwarded—

Q. Wait a minute, Mr. McCoart. You are under oath now, please. We have to have your honest answer.

Can you now say that that is the carton that was involved in the accident with Mrs. Lawson? A. This would be the carton.

Q. This is it, right? A. This would be the carton, yes.

Q. And you so marked it? Did you mark it in some way? A. I don't recall marking it.

Q. Well, because it is going to be shown to the jury so we have got to understand what this is on it. Can you [137] explain what this "Mrs. Richard Lawson" with the phone number is? A. To have some record of why we would have this carton, we would put a name on it or a reference.

Q. Well, is it a reasonable assumption that this is the carton that was involved with Mrs. Lawson's accident? A. Yes, it is.

Q. Is that your writing on there, "Mrs. Richard Lawson"? Do you know? A. This is not my writing, but this would have been my instructions to identify this for the future.

Q. Now, calling your attention back to the date of this accident and after you took care of Mrs. Lawson and saw that she got to the hospital, you went back—if I understand you correctly—and you took this carton from someplace in the store, is that right? A. Yes.

Q. Do you recall where it was that you took it, whether it was from the floor or in a tray, or where? A. I cannot recall.

Q. Now, your testimony when Mr. Doherty asked you the question as to whether or not the carton was intact at the time that you saw it, you were talking about the bottom of the carton, is that right? A. Yes.

[138] Q. It is your testimony that it was intact, is that right? A. It was intact, yes.

Q. And after you got it, did you then—whatever you want to phrase it—break it open and fold it at that time to preserve it? A. Yes.

Q. Is that correct? A. Yes.

Q. So that at the time that you first got it after the accident, it was not in that folded condition? A. It was not in a flat condition like this.

MR. GRIMALDI: I have no further questions.

MR. DOHERTY: No questions, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MR. KARR:

Q. Did you say that you took it apart to preserve it? A. To store it, we took it apart.

Q. To store it. All right.

MR. KARR: I have nothing further, Your Honor.

THE COURT: All right. The exhibit will be admitted in evidence.

(Plaintiff's Exhibit No. 16 was admitted into evidence.)

THE COURT: Are there any further questions of this [139] witness?

MR. GRIMALDI: No, Your Honor

May he be excused to return to the store?

MR. KARR: Yes.

THE COURT: He will be excused.

(The witness left the stand.)

THE COURT: Ladies and gentlemen of the jury, let me inform you that I am not going to be able to hold court this afternoon so we are going to run an extra half hour this morning and recess at one o'clock. That will give you plenty of time to get into the cafeteria, and so forth. We will take a short recess in a little while, but plan on a one-o'clock sitting this morning and nothing this afternoon. Then we will reconvene tomorrow at the usual time.

* * *

[60] Whereupon,

NATHAN MALINICK

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KARR:

Q. Mr. Malinick, will you tell us please, sir, your full name and your residence address? A. Nathan Malinick. I live in Arlington, Virginia.

Q. By whom, Mr. Malinick, are you employed? A. Rock Creek Ginger Ale Company.

Q. For how long, Mr Malinick, have you been employed at Rock Creek Ginger Ale Company? A. About 30 years.

Q. Thirty? A. About 30 years.

Q. Do you hold a position with the company as an officer? A. Yes, I do.

Q. What officer are you of Rock Creek Ginger Ale? A. Treasurer.

Q. Mr. Malinick, in front of you, sir, is a six-pack carton of Blair House Club Soda. Is that Blair House Club Soda manufactured or bottled and distributed by Rock Creek Ginger Ale Company? [61] A. It is.

Q. I wonder if you would examine, Mr. Malinick, the carton within which those six bottles of club soda are contained. A. Yes.

Q. Do you recognize that carton? A. Yes, I do.

Q. For how long has that carton been in use by Rock Creek Ginger Ale Company for packaging Blair House Club Soda? A. About ten years.

Q. Ten years, sir? A. That's right, except for a little change in the wording on the face. It is the same carton.

Q. It is the same carton, right? A. That is right.

Q. Mr. Malinick, pursuant to the subpoena served upon you, did you produce some records for us in court today? A. I was told—

MR. DOHERTY: Your Honor, may we approach the Bench on that?

THE COURT: Surely.

(At the Bench:)

MR. DOHERTY: If Your Honor please, so there won't be any misunderstanding, I will inform the Court that Mr. Malinick's testimony will be there are no records. The records were searched and there were no complaints about Blair House [62] Club Soda, whatever that stuff is there, during the three years prior to this accident.

MR. KARR: No complaints?

MR. DOHERTY: No written complaints.

MR. KARR: There are no memoranda on file of any breakages?

MR. DOHERTY: There is none on Blair House Club Soda. That is going to be his testimony.

MR. KARR: I can produce pleadings and cases—Certainly, Mr. Malinick has in fact filed answers to interrogatories in cases involving club sodas. I can't imagine that Mr. Malinick searched the records very carefully.

MR. DOHERTY: I am just telling you what the evidence is. You can impeach him if you want to.

THE COURT: He is his witness. It will be hard for him to impeach him.

If we are going to get into similarity of accidents, you have to produce the similarity of accidents. Cartons can open from the bottom, the top; they can be torn. If we are going to put on the packaging deal, you have to put on evidence of similar circumstances.

MR. KARR: If Mr. McCoart will say, as he did on deposition, that it happened periodically, then they were aware of this happening. Mr. Malinick has already cured the other objection. They knew this carton was used for the past [63] ten years.

THE COURT: When he said it happened periodically, what was he referring to?

MR. KARR: Bottles falling out. That's the case.

THE COURT: There has been no proof yet that the bottom was defective. All you have is proof that a bottle fell out.

MR. KARR: There is proof that immediately after the accident, somebody lifted the carton up and the remaining bottles came out from the bottom.

MR. DOHERTY: We are not trying that case.

MR. GRIMALDI: What he is trying to try is the packaging case. What we are concerned with is whether or not there is a defect in the package. If he wants to prove all the packaging is defective—

THE COURT: He is going to have to put an expert on to show a defect.

MR. KARR: Let me make this representation: The defendant store has already said in opening statement that they did not inspect and had no opportunity to inspect. The defendant Rock Creek Ginger Ale Company says, Once the stuff got to the store, it wasn't our concern.

Now we have here a carton, the bottom of which fell open. Whether it was because it was torn, whether it was because it wasn't attached properly, whether it was because [64] the tensile strength wasn't sufficient enough is not the question; the fact is that the bottom fell out of the carton that was sitting on display for selection by the customers.

MR. GRIMALDI: That is not so at all. It had not been placed on the display counter; it was stacked up in the aisle.

THE COURT: We will get into that phase of the case later.

All right. Ask your questions about the records. Go ahead. Bear in mind he is your witness. I probably won't permit you to impeach him.

MR. KARR: Well, he is an adverse party.

THE COURT: I know he is an adverse party, but he is your witness.

MR. KARR: If he is an adverse party, I can cross-examine him under Rule 42.

MR. DOHERTY: Your Honor, are you making a ruling that he is an adverse party?

THE COURT: He is an adverse party but not necessarily a hostile witness.

MR. KARR: Right, right.

THE COURT: All right. Go ahead.

(In Open Court:)

BY MR. KARR:

Q. Mr. Malinick, did you search your records covering [65] the three-year period from September 16, 1963 to September 16, 1966? A. Yes, I did.

Q. Did you search those records for written memoranda or evidence of inicdents where the packaging of 12-ounce bottles, six packs, where the packaging gave way and the bottles fell out?

MR. DOHERTY: Club soda.

MR. KARR: Club soda.

THE WITNESS: Yes, I did.

BY MR. KARR:

Q. Did you bring those records with you? A. There are no records.

Q. You have none? A. There are no records of any claim of this type at all.

Q. Mr. Malinick, do you use the same package for other kinds of carbonated beverages, other than the writing on the outside? A. Yes.

MR. DOHERTY: I object to this, Your Honor. This is going beyond what we talked about at the Bench.

THE COURT: We are talking about club soda in this case.

MR. KARR: Well, Your Honor may recall—I would be [66] glad to represent this at the Bench if they have any objection to my representing it in open court.

THE COURT: You had better come to the Bench.

MR. KARR: All right.

(At the Bench:)

THE COURT: What are you trying to get at now?

MR. KARR: As I understood Your Honor's ruling this morning, we are entitled to show there was a pressure difference between non-carbonated beverages and carbonated beverages.

We are entitled to show they took no different care for the two types of beverages. What I want to show is they used the same package for both.

THE COURT: You keep stretching this case. We are dealing now with the six-pack carton of carbonated water, that because of the internal pressure of the club soda, the package wouldn't hold. Now you are going to get into ginger ale and coca-cola—

MR. KARR: That's all I want to show, that club soda has a greater internal pressure. He is an expert on that.

THE COURT: If you can qualify him as an expert in carbonation, go ahead.

MR. DOHERTY: What are you getting at now?

MR. KARR: I am getting at the point that these people knew or should have known that when they are dealing with a more dangerous beverage than a non-carbonated beverage, [67] they should package it differently. Or if the bottles—

THE COURT: He has already said he has no complaints about the packaging of this particular club soda and it is working very well.

MR. KARR: We have other evidence on that.

THE COURT: Then put on your other evidence.

I have never tried a case like this in my life.

MR. KARR: Mr. McCoart gave contrary evidence in his deposition in which he said it happened periodically.

THE COURT: If this man has double-crossed you, where do you go from there?

MR. KARR: I want to find out if he used the same package for all of his beverages.

THE COURT: What will that prove?

MR. KARR: It will prove that knowing that club soda had a much greater potential for exploding than, say, grape soda, they needed a package with greater tensile strength in which to package it.

THE COURT: Maybe the package is adequate for club soda. You are assuming it isn't.

MR. KARR: You have seen the deposition of Mr. McCoart and he says—

THE COURT: He says bottles fell out of the cartons periodically. What does that mean?

MR. KARR: I believe on the following pages, what he [68] says is that wet bottoms could cause this.

THE COURT: What does it prove if the package he has is used for ginger ale and coca-cola and carbon dioxide, but it is capable of holding any one of the three?

MR. KARR: Right—

THE COURT: What's wrong about the packaging?

MR. KARR: —if ginger ale, coca-cola and carbon dioxide produced no different effect when it broke.

THE COURT: This is where you have to put your explosion expert on.

What is the inference is that package will hold club soda without danger?

MR. KARR: The inference is lack of due care.

THE COURT: Not if the package will hold club soda without danger.

MR. KARR: Mr. McCoart says bottles fall out of these packages periodically. He says sometimes they are open, sometimes they are wet.

THE COURT: What has that got to do with the adequacy of the package if somebody opens it up and then somebody else comes along and picks it up and bottles fall out? I wish you had pretried this case properly and know what you are talking about.

What is your next question going to be?

MR. KARR: My next question will be, Do you use the [69] same packaging for all of your bottles?

If he says, Yes, I will ask him what the potential internal pressures are—For example, I will say, At what pressure is Blair House Club Soda bottled; at what pressure is ginger ale bottled, and so forth.

THE COURT: Are we getting rid of an expert then?

MR. KARR: I think this man will do both.

THE COURT: Go ahead. Let's see how far you go. Be prepared to be interrupted if you get too far afield.

MR. KARR: Okay.

(In Open Court:)

BY MR. KARR:

Q. Mr. Malinick, can you tell us whether or not this same kind of package, that is a package identical to that except for the writing on the outside, is used for other carbonated beverages bottled and distributed by your company? A. Yes.

Q. How many other kinds of beverages would that be? A. Oh, I would say seven or eight. I'm not quite sure.

Q. Can you tell us what they are? A. Well, I can name some of them offhand.

Q. All right, sir. A. Ginger ale, quinine, grapefruit, bitter lemon, orange, grape.

Q. Are they all carbonated beverages, Mr. Malinick? [70] A. Yes, they are all carbonated.

Q. Is there a variation between or among the various beverages in the internal pressure of each of those? A. Yes, there would be.

Q. At what pressure is club soda bottled, internal pressure? A. Well, we don't deal with pressures because the pressure changes from time to time.

Q. Pardon me? A. The pressure changes from time to time, depending on the temperature.

Q. Yes. At what pressure is Blair House Club Soda bottled? A. I say we do not deal in terms of pressure; we deal in volumes, which is a combination of pressure plus temperature.

Q. At what volume is Blair House Club Soda bottled? A. About four volumes.

Q. And at what volume is the grapefruit bottled? A. About three and a half.

Q. At what volume is the ginger ale bottled? A. About four.

Q. And what volume is the quinine bottled? A. Four.

Q. At what volume is the grape drink bottled? A. About two.

[71] Q. And at what volume is the orange bottled? A. About two.

Q. Have I covered them all? A. I think so.

Q. Do you use the same carton for the orange and the grapefruit? A. Yes, we do.

Q. And is the carton used for the orange and the grapefruit the same carton as you use for Blair House Club Soda? A. Yes.

Q. Are the bottles the same? A. Yes.

Q. Would you tell us what you mean when you say that Blair House Club Soda is bottled at four volumes? What does that mean? A. We bottle our products at approximately 35 degrees.

Q. Temperature? A. At that temperature, yes, and we have four volumes.

Q. You have what, sir? A. I don't have my chart with me to tell you what the pressure would be, but there is a variation between a 35 degrees temperature and a 60 degrees temperature but the four volumes remains constant.

Q. When you bottle at 35 degrees temperature, could you give us the approximate internal pressure? [72] A. I would have to guess at it. I am not sure.

MR. DOHERTY: Your Honor, for the record, I would like to object to this line of questioning as going beyond the scope of the pretrial order.

THE COURT: Your objection is noted. You have your exception.

BY MR. KARR:

Q. Would you give us the approximate internal pressure, Mr. Malinick? A. It would be a guess, and I don't think you want a guess.

Q. Is it about 72 pounds per square inch? A. No, it is not.

Q. Does the internal pressure of Blair House Club Soda ever reach 72 pounds per square inch? A. It could at extreme temperatures.

Q. "Extreme temperatures" meaning what, sir? A. Say, 85-90.

Q. Degrees? A. Yes.

Q. At approximately 65 to 70 degrees Fahrenheit, what is the internal pressure of bottled Blair House Club Soda? A. I would be guessing if I gave it to you. I can't tell you unless I have my chart.

Q. About 65 pounds per square inch? [73] A. Well, you can guess at that but I can't be sure, because I don't have my chart.

Q. Is that approximately right? A. I couldn't say that.

MR. DOHERTY: Your Honor, I object.

THE COURT: Would you come to the Bench again, gentlemen.

(At the Bench:)

THE COURT: This is leading up to that blind alley that they use the same bottle for all purposes and the same carton, so you can't draw any inference that it has to be particularly dangerous for club

soda. They have a package deal here that is designed to handle all possibilities. Quinine is four; ginger ale is four; club soda is four. It is obvious the bottling is designed to handle all possible contingencies and the packaging is designed to handle all possible contingencies; so you are not showing that club soda is any more dangerous.

MR. KARR: You have a two volume for at least two beverages—

THE COURT: The inference is not warranted.

MR. KARR: If a package is designed to accommodate a beverage bottled at two volumes—

THE COURT: It doesn't mean to say it doesn't handle a four volume. Get to your packaging. It doesn't mean [74] a thing. The inference is that it is the same bottle handling the same thing. They are all put in at the same volume and the same pressure.

MR. KARR: They are not. He said two of them—

Well, okay.

(In Open Court:)

BY MR. KARR:

Q. Mr. Malinick, do you know how Rock Creek Ginger Ale Company goes about selecting the kind of carton to be used for packaging 12-ounce bottles of carbonated beverages? A. How we select the carton?

Q. Right. A. Well, we are not experts on cartons. We go to the carton manufacturer, who are experts, and we tell them what we want and they furnish what will do the job.

Q. In connection with that, Mr. Malinick, did the Rock Creek Ginger Ale Company order the same kind of carton for the orange and grapefruit that you ordered for the club soda? A. Yes.

Q. Did you discuss with the people who made the carton the variation of pressures and the various bottles that would be contained in those six packs?

MR. DOHERTY: Your Honor, he is not laying a foundation as to whether Mr. Malinick was the one who entered into all of these negotiations and everything else.

[75] THE COURT: Let's determine whether he knows about these negotiations.

MR. KARR: Excuse me.

BY MR. KARR:

Q. As an officer of the company, are you aware of these negotiations with the carton manufacturer? A. Yes.

Q. My last question, Mr. Malinick, was: Were you privy to and did you actually participate in the negotiations; A. Partly, yes.

Q. Partly. Who makes this carton which is in front of you? A. This carton is made by Meade Manufacturing Company.

Q. Meade Manufacturing Company is in Atlanta, Georgia, right? A. That is right.

Q. And when Meade Manufacturing Company delivers the cartons to you, they deliver them flat; is that right? A. That is right.

Q. You put the soda in the bottles and you assemble the cartons, is that right? A. That is right.

Q. At the time that you went to Meade and you said that you wanted cartons for your 12-ounce bottles of carbonated beverages, did you say to Meade that there was going to be any [76] difference between the pressure in the club soda and the pressure in the orange? A. We did not discuss that specifically but they, being suppliers to the bottling industry, knew as much about that if not more than we did.

Q. But you didn't address that to Meade, is that right? A. Yes.

Q. All right.

Quite apart from your records or quite apart from the records on file in the Rock Creek Ginger Ale Company, do you have any personal knowledge of any Blair House Club Soda six-pack 12-ounce

cartons, the bottoms of which fell out between September 16, 1963 and September 16, 1966? A. No.

Q. Do you know how much weight a six-pack package of Blair House Club Soda is supposed to carry? A. Offhand I do not know, no.

Q. Now, you say if you brought your charts, you would be able to tell us the pressure per square inch, internal pressure at a given volume at a given temperature? A. Yes.

Q. All right, sir. Would you do that for us, please, bring the charts so that we can establish or make that formula?

MR. DOHERTY: Your Honor, there is no reason for this.

[77] THE COURT: Mr. Karr, can we agree that club soda is bottled at four volumes; that quinine is bottled at four volumes, that ginger ale is bottled at four volumes, that grapefruit is bottled at three and a half volumes, and that orange is bottled at approximately two volumes?

MR. KARR: And grape at two.

THE COURT: And grape at two volumes.

BY MR. KARR:

Q. What about bitter lemon, Mr. Malinick—I didn't ask you about that—how many volumes is bitter lemon bottled at? A. I didn't hear your question.

Q. How many volumes is bitter lemon bottled at? A. I think it is four volumes but I am not sure of that.

THE COURT: Do we need the charts for anything further?

MR. KARR: Yes, sir, to get the pounds per square inch. He knows that at—

THE COURT: What does one volume equal in pounds per square inch? Do you know?

THE WITNESS: We can't translate that, Your Honor. It depends on the temperature.

MR. KARR: He said, if the Court please, that he can tell it with a chart.

[78] THE COURT: I still don't get the relevancy of it, Mr. Karr. All these things are bottled at the same volume. Now, what else do you want to prove?

MR. KARR: Well, they are not. The organe and the grape are both bottled at half the volume of club soda.

THE COURT: All right. And they are put in the same package.

MR. KARR: The same bottle and the same package, right.

THE COURT: Now, where do we go from there?

MR. KARR: Well, as the Court knows, our proffer of proof is that—

MR. GRIMALDI: Your Honor, I don't want him mentioning proffers of proof now in front of the jury.

THE COURT: No, not in front of the jury. Come to the Bench again, gentlemen.

(At the Bench:)

THE COURT: If I send him home to pick up his charts, what are we going to prove with them?

MR. KARR: First of all, volumes is a measurement used peculiarily by Rock Creek so far as I know; pounds per square inch is the general standard used, as I understand it.

THE COURT: Can't we assume that these four or five items are all the same pounds per square inch?

MR. KARR: I assume so.

[79] THE COURT: Then why do we need the chart?

MR. KARR: He said a bottle of Blair House Club Soda will reach 72 pounds per square inch at extreme temperatures, which I believe he said was 90 to 100. I am saying when I asked him what the pounds per square inch would be of club soda at a temperature of 65 to 70 degrees Fahrenheit—which, I think it is reasonable to assume, was the temperature in the store at 9:30—he said he didn't know but he could figure it out with the chart. I said, Would that be 60 pounds per square inch? He said that would be a guess.

I am perfectly happy to enter into a stipulation based on Mr. Malinick's computation. He doesn't have to come back if they are willing to stipulate that at 65 to 70 degrees, the internal pressure of a 12-ounce bottle of Blair House Club Soda is whatever he computes it to be.

THE COURT: I told you this morning I want to limit this to the packaging deal. I have let you go and go and go. You keep getting back to how many pounds of pressure. Pounds of pressure isn't what caused this package to open up.

MR. KARR: Our only point is that pounds of internal pressure is going to have some effect on the ultimate possible injury or potential injury to the consumer and, therefore, should be packaged with greater care.

THE COURT: Get somebody in to say pounds of pressure does this. You are going all over the lot here. [80] None of this is relevant the way you have put it in. Your point heretofore has been that club soda stood on a little pedestal all by itself. It had to have special treatment. Now we find all these other things get the same treatment.

Let your man go home and find out what these pounds per square inch are. I don't know what it proves.

MR. DOHERTY: Do you want him to give me the computation and you will stipulate to them?

MR. KARR: I will stipulate to them, yes.

MR. DOHERTY: All right. Of course, I am still objecting to it, Your Honor. I don't think it is relevant.

MR. KARR: The stipulation will be at an outside temperature of 65 to 70 degrees.

MR. DOHERTY: Why don't you write it down?

MR. KARR: Yes, okay.

THE COURT: Figure it out after court. Let's get on to something relevant.

MR. KARR: All right.

(In Open Court:)

BY MR. KARR:

Q. Mr. Malinick, looking again at Plaintiff's Exhibit No. 1, is this the only package that you package 12-ounce throw-away bottles of club soda in the past, I believe you said, ten years? A. That is right.

[81] Q. And did in fact Rock Creek Ginger Ale Company sell six-packs identical to the one before you—with the possible exception of some change in lettering—to the Giant Food Stores, Inc. during the month of September, 1966? A. If they had it, I would have to assume that we did, yes.

Q. In other words, Giant Food couldn't have bought it from anyone other than Rock Creek? A. That is right.

Q. Where are the cartons themselves assembled? That is, where are they taken from being flat and put together? A. In our plant.

Q. Where in your plant, Mr. Malinick? At what stage of the bottling process? A. After being bottled.

Q. In other words, the soda is put in the bottles, is that right? A. That's right.

Q. On an assembly line of some kind? A. That is right.

Q. And then after the 12-ounce bottles are filled with club soda, they are then put in the container? A. That's right.

Q. Describe for us the process by which that container gets wrapped around the bottles. [82] A. Well, I am not a mechanic but this is a machine that is furnished by Meade Packaging Corporation.

Q. Oh, the package is connected by a machine? A. That's right.

Q. And how are the bottles put inside of the package? Have you seen the machine operate? A. Yes.

Q. Describe it for us, please. A. Well, they are fed down the line in a line of twos, such as you see them here; and as they enter the machine, the carton comes down over the top and is folded and locked underneath.

Q. Locked underneath how? A. Through the four locks that we have on the bottom of the carton.

Q. Do you have any glue on the bottom of the carton? A. No, there is no glue.

Q. Now, are all the 12-ounce bottles of Blair House Club Soda run off the same assembly line? A. Yes.

Q. Do you provide the workers on that assembly line with any protection against bottles that break or explode?

MR. DOHERTY: Your Honor, I object. I don't think that has any relevancy here.

THE COURT: Again, what is the relevancy?

[83] MR. KARR: It shows that, if there is protection, there is a potential danger.

MR. DOHERTY: That could have been in 1911 or ten years ago.

MR. KARR: No, Your Honor. He knows what we are talking about. We are talking about September of 1966.

THE COURT: You can answer if you know. Go ahead.

THE WITNESS: Your question again, please.

BY MR. KARR:

Q. Did you provide any protection for the workers on the assembly line on which those 12-ounce bottles were packaged? A. In 1966?

Q. Yes. A. No, we did not.

Q. You did not? A. No.

Q. You didn't provide protective shields? A. No.

Q. Are the machines themselves provided with any protective devices, that is, were they in September of 1966? A. The bottling machine?

MR. DOHERTY: Your Honor, I object again on the same basis. This is entirely immaterial and irrelevant to this case.

THE COURT: Yes. I will sustain the objection.

[84] BY MR. KARR:

Q. Mr. Malinick, after the bottles are packaged, after they are wrapped around in that package like Plaintiff's Exhibit No. 1, where do they go then, sir? A. They are conveyed to a station where they are placed in a cardboard box.

Q. Is the cardboard box like a cardboard tray? A. Tray, that is right.

Q. With about an inch or so on the side up? A. Oh, it's better than that, probably three or four inches.

Q. Wasn't it about an inch to an inch and a half in September of 1966, Mr. Malinick? A. No, it never has been.

Q. Mr. Malinick, how many of those 12-ounce six-pack cartons fit into the cardboard tray? A. Four.

Q. And where are they taken then after they are put in the cardboard tray? Are they put in the cardboard tray directly from the assembly line? A. Yes.

Q. Are they filled in the cardboard trays also by the machine, sir? A. No.

Q. After they are put into the cardboard trays, where [85] are they taken then, sir? A. They are placed on a pallet.

Q. In the cardboard trays? A. That is right.

Q. And delivered to where? A. To a storage area.

Q. What is the storage area? Is that a place from which they are ultimately distributed? A. That is right.

Q. How long do they remain in the storage area before they are delivered? A. That varies.

Q. From what to what, Mr. Malinick? A. Well, I couldn't tell you. That depends on the need.

Q. Now, when you received orders from Giant Food in September of 1966, would the cardboard trays of six-pack cartons then be taken out of the storage area and sent to Giant Food? A. Generally, that is true. They are placed on a delivery truck.

Q. A Rock Creek delivery truck? A. It belongs to Rock Creek Ginger Ale; that's right.

Q. Right. And it is driven by an employee of Rock Creek Ginger Ale Company? A. That is right.

Q. And then what happens? [86] A. As they come to the individual stores, they take their orders off of these trucks and place them in the stores, in the back room.

Q. In the back room? A. Yes.

Q. Don't Rock Creek Ginger Ale delivery men occasionally deliver them right out on the floor? A. I wouldn't know.

Q. Well, then, why did you say "in the back room"? A. Well, that is where they are supposed to put them.

Q. According to what? A. Well, according to the union contract of the Clerks' Union and the stores, they are the ones that are supposed to put them on the shelves.

Q. Do you know as a fact that trays containing four six-packs are as a matter of practice rolled out onto the floor by Rock Creek's drivers? A. What was that question again, sir?

Q. Do you know as a fact that as a practice those trays of Blair House Club Soda bottles are rolled out onto the floor of the store, in the aisle of the store, by Rock Creek employees? A. I couldn't say. I don't know.

Q. You don't know? A. I don't know.

[87] Q. Do you manufacture your own cardboard trays or do you get those from someplace else? A. No, they are purchased.

Q. And used new for your purposes? A. Yes.

Q. Are they also purchased from Meade? A. No.

Q. Where are they purchased from? A. The bottles come in these trays from the glass factory. The glass company supplies them.

Q. And the trays, then, arrive with the bottles? A. That is right.

Q. I see.

Are there any specifications for those trays at all, or do you just get what the bottle company sends you?

MR. DOHERTY: Your Honor, I object. Again, I fail to see the relevancy.

THE COURT: What is the relevancy?

MR. KARR: I am almost finished with the witness, Your Honor.

THE COURT: I understand that. But what has the tray got to do with this accident?

MR. KARR: I would be glad to represent it in front of the jury, but I don't think you want me to.

THE COURT: No. Come to the Bench.

[88] (At the Bench:)

THE COURT: Are you alleging, now, a defective tray?

MR. KARR: No, no.

Mr. Doherty, on cross-examination of the plaintiff, cross-examined her very carefully and very thoroughly on how she had manipulated the six-pack carton out of the tray.

Mr. McCoart, in his deposition, said he thought the side of that tray was about two inches.

THE COURT: This witness says three or four inches.

MR. KARR: What I want to demonstrate is that there is no standard height for the sides of the tray. I propose to do that because he is going to argue that she had to lift the six-pack carton to get it over the edge of the tray. I want to show there were no specifications for these trays and they just took whatever came. There was no specific size or dimension for the tray.

THE COURT: Why don't you ask him that? Then they will cross-examine and he will say they always have a side to it.

MR. KARR: That's all I want to know.

(In Open Court:)

BY MR. KARR:

Q. Were the trays that you told us that were delivered containing the bottles that you got from the glass company, were there any specifications for them? Did you give any [89] specifications for those, or did you just take what came? A. No. They are not to be less than 175-pound test.

Q. The trays? A. That is right.

Q. The size of the trays are not by specification, are they? A. Well, they are made to fit four cartons that contain 24 bottles.

Q. At the time they are delivered to you, they contain just bottles, is that right? A. That is right.

Q. They don't contain those cartons? A. No, they do not.

Q. Do they have printing on the sides of them, various names? A. Yes, they do.

Q. Different names or your name? A. Our name.

Q. And that is done by the bottle company? A. By the bottle manufacturer.

Q. By the bottle manufacturer, right.

MR. KARR: I think that is all I have, Your Honor.

Thank you, Mr. Malinick.

THE COURT: Is there any cross-examination?

MR. GRIMALDI: No cross, Your Honor.

* * *

[139] Whereupon

LOUISE QUICK

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KARR:

Q. Will you state your name, please? A. Louise Quick.

Q. In September of 1966, where were you living, Mrs. Quick? A. In Southwest, in the District.

[140] Q. Can you tell me your address? A. 388 N Street.

Q. Who was your next-door neighbor? A. Mrs. Lawson.

Q. The plaintiff in this case? A. Yes.

Q. Mrs. Quick, can you tell us where your husband worked in September of 1966, that is, the physical location and the name of the agency? A. He works at Tempo-8 on Newark Street just off Wisconsin Avenue.

Q. And is that– A. It's for the Air Force.

Q. What was your practice with respect to grocery shopping back in September of 1966? A. I used to do all my shopping at the Giant on Newark Street, because it was convenient. We only had one car and I would take him to work and leave him there, and then do my shopping and go home.

Q. You would leave your husband at work and do your shopping at Giant's. A. Yes.

Q. What was your practice with respect to Mrs. Lawson? A. Well, since Mrs. Lawson didn't drive, I would take her with me once a week to do our shopping together–not [141] every week but mostly.

Q. On Friday, September 16th, 1966, did Mrs. Lawson accompany you, Mrs. Quick, that morning? A. Yes.

Q. Did you in fact drop Mr. Quick off at work that morning? A. I presume so. Sometimes I didn't always do it at nine o'clock in the morning. I sometimes would keep the car and go later in the day. I can't recall specifically. I imagine if it was a Friday morning, yes.

Q. Did you and Mrs. Lawson go to the Giant Food Store that morning? A. Yes.

Q. Did you shop together or did you shop separately? A. We shopped separately.

Q. When and how did you first become aware that something had happened to Mrs. Lawson? A. I think that they called my name over the loudspeaker and I went to the office, and the lady said to me, "There has been an accident." And she took me over to where Mrs. Lawson was.

Q. "The lady" meaning an employee of the Giant Food Store? A. Yes.

Q. Where was Mrs. Lawson when you first saw her? [142] A. She was lying on the floor in the aisle where the pop was kept. You know, the cold drinks.

Q. The carbonated soft drinks? A. Yes, the soft drinks.

Q. Now, do you know whether or not Mrs. Lawson had completed her shopping at that time? A. Yes.

Q. How do you know she had completed her shopping? A. Because she told me that her things were already in the basket outside waiting to be loaded in the car and she was waiting for me, and she had come back to pick up a carton of soda.

Q. Do you mean they were actually bagged and checked out? A. Bagged and put into the basket, checked through, waiting outside; yes.

Q. Now, did you stay with Mrs. Lawson at the store? A. Yes.

Q. Will you tell us what happened, how Mrs. Lawson left the store? A. Well, I didn't know what had happened to her. I thought that she had fainted or taken ill in the–

Q. Tell us what happened. How did Mrs. Lawson leave the store? A. Oh, they sent for an ambulance and put her on a [143] stretcher and took her out.

Q. Did you later see Mrs. Lawson at Georgetown Hospital later that day? A. Yes, I went to fetch her from the Emergency Room where she had gone to and had stitches, and she came out on crtuches.

Q. What was her appearance when you saw her later that day? A. Well, we were both, you know, quite stunned because—

Q. What was her appearance, the way that she looked? A. What do you mean, the plaster?

Q. Yes. A. Well, her leg was encased in a plaster cast and her foot, right the way down.

Q. Did you in fact drive Mrs. Lawson home that day? A. Yes.

Q. For how long did you remain living as Mrs. Lawson's next-door neighbor? When was it that you moved? A. Oh, over a year. We moved in November of '67.

Q. During that year, did you have occasion to see Mrs. Lawson regularly? A. Oh, yes.

Q. And do you still see her occasionally? A. Yes.

Q. Now, will you describe for us what you observed over [144] that year with respect to Mrs. Lawson's injury and any limitations that you were able to observe as a result of it? A. Well, she was in the plaster for a few months. I don't remember quite exactly how long. I suppose about two months or so. Then, you know, there was the scar but she was always in pain.

Q. Was that characteristic of Mrs. Lawson as you had known her? A. No, she never admitted to anything. In fact, I have seen her cut her hand wide open and not even bother about it.

Q. You mean prior to this? A. Yes.

MR. KARR: I think that is all. Thank you, Mrs. Quick.

CROSS EXAMINATION

BY MR. GRIMALDI:

Q. Mrs. Quick, where are you employed at the present time? A. I am not employed, sir.

Q. Have you at some time in the past been secretary to Mr. Karr? A. Yes.

MR. GRIMALDI: That is all I have.

MR. DOHERTY: I have no questions, Your Honor.

REDIRECT EXAMINATION

BY MR. KARR:

Q. Were you also a neighbor of mine? A. Yes.

MR. KARR: That is all. Thank you.

THE COURT: Thank you, Mrs. Quick. You may step down.

* * *

[152] ORAL RULING OF THE COURT

THE COURT: Well, as you all may gather from some of the remarks that I have made, I do have some concern with this case on the point of negligence; but on the other hand, I do feel there was enough evidence introduced for the jury to find negligence if they would have wanted to find it. So, I do not think I can second guess the jury.

As for the remittitur: I think the jury was very, very generous. Had I been a juror, I don't think my verdict would have been that high. Again, I cannot substitute my judgment for theirs. I cannot say that it is shocking or grossly excessive, or any of the common names that we give these excessive verdicts. So, I am going to let the verdict stand.

I will deny the motion for a new trial, deny the motion N.O.V., and deny the motion to set aside the verdict.

As I say, I am not too happy with the case but I do not think there is much else I can do with it.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,208

MARIA A. LAWSON

V.

GIANT FOOD, INC.

Appellant

and

ROCK CREEK GINGER ALE CO., INC.

APPEAL FROM A JUDGMENT OF THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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INDEX

TABLE OF CASES

Cases chiefly relied upon.

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to Rule 8(d) of the United States Court of Appeals for the District of Columbia Circuit Rules, counsel represents that the case herein involved has not previously been before this Court under the same or similar title.

REFERENCES AND RULINGS

There are no references or rulings such as is contemplated by Local Rule 8(e) in this case. This is an appeal from a money

judgment as evidenced by a routine minute entry.

STATEMENT OF THE CASE

This case involves a personal injury to appellee, a customer in a food store, sustained when she was cut by glass from a bottle of soda water that broke on the floor after she had apparently attempted to pick up a six pack carton of the bottles of soda in appellant's store. Upon trial, plaintiff recovered a verdict after denial of motions by this appellant; a motion for judgment non obstante veredicto was also denied. The six pack carton involved is not a tray or box type, but is a sleeve or casing of cardboard that is wrapped about the six bottles and locked in place by tabs. (TR. p. 82). The six packs are delivered to this appellee's store, four six packs in a shallow cardboard box called a tray (TR. p.84).

On the occasion in question, a stack of cardboard trays had been left in the aisle of the store by the deliveryman for the manufacturer, shortly before the accident. There was one six pack left in the top tray when the customer pulled the six pack toward her (TR. p.11), but did not lift (TR. p.26). She heard a bottle break on the floor (TR. p. 12), and the six pack was still in the cardboard tray. When the six pack was finally lifted, the remaining four bottles fell out (TR. p. 20).

The manager of appellant's store called as plaintiff's witness testified that there had been occasional trouble with bottles

of this type of carton (TR. p. 95), but that he had not experienced such trouble with this particular product. (TR. p. 93). The bottled beverages, having been left in the aisle by deliverymen would be placed on the shelves for sale, marked as to price, and "looked at" by a clerk in the process. The manager further testified that the carton was intact (TR. p. 126) when he recovered it after the injured person had been assisted, and that he took it apart and folded it away to preserve it. The carton was produced at trial and was not torn or defective, nor did it appear to have ever been wet. All the cardboard tabs designed to hold it together were present.

SUMMARY OF ARGUMENT

Appellee has recovered a rather generous (TR. p. 152) judgment against this appellant, based on a theory of negligence, but what that negligence might have been is largely a matter of conjecture. Apparently the theory is that all merchandise must be inspected before sale and that the retailer is not justified in relying on a reliable manufacturer whose product has not caused trouble before. Appellant maintains that it has no duty to inspect merchandise and that it is entitled to assume that the products delivered to it are safe.

Secondly, appellant maintains that appellee's evidence does not show that the carton was defective, for it proves that the carton was open (TR. p. 20) and also proves that it was intact

(TR. p. 126) and that she never lifted it, hence never exerted upward force so as to put the weight of the bottles on the bottom. This leaves the accident virtually unexplained; and even the plaintiff, the only eyewitness, has not testified that she saw any bottles fall from the suspected carton, but only that she heard the crash.

Appellant submits that the total case shows a happening of very questionable cause, disclosing no real proof of negligence, and in view of the conflicts in plaintiff's case, proving nothing as to the happening.

ARGUMENT

The evidence, all of which is furnished in plaintiff's customer's case, shows only that the plaintiff was cut by glass from a dropped bottle in appellee's store. The only possible basis for a verdict that suggests itself to appellant is that a duty to inspect has been fixed upon the food retailer, although the need to inspect this particular product is a wisdom born of the event, for plaintiff's own witness, the store manager recalled no prior trouble with this brand of bottled beverages.

The general rule is that there is no duty to inspect merchandise that is not of an inherently dangerous character. This has been held to apply to bottled beverages, in Coca-Cola Bottling Co. v. Swilling, 1933, 186 Ark. 1149, 57 SW 2d 1029, (involved a

centipede in a bottle) 6, ALR, 3d, 26, (amno.). The instrumentality in this case, a cardboard container of bottled soda water is hardly a thing of such dangerous character that it must be sequestered, guarded or kept from public reach until it can be examined.

In previous cases, notably Willoughby v. Safeway Stores, Inc. 91 U.S. App. 168, 198 F 2d 604, and Atwell vs. Pepsi Cola Bottling Company of Washington, 152 A2d 196, the appellate courts of this jurisdiction have characterized the evidence in cases generally similar to this as "insufficient." In both Willoughby and Atwell, the offending product had been subjected to a little more handling than had the carton here, and in both cases reliance was sought on res ipsa loquitur. However, the basic facts are substantially the same, particularly in Willoughby. There, a customer of a supermarket was injured when the handle fell off of a cardboard carrier of soft drinks, as she was carrying it in the store. A ruling by the trial court that there had been no showing of negligence was affirmed on appeal.

The Willoughby case is in accord with the well established rule that the mere happening of an accident gives no indication of negligence. The proof of an accident is all that is present in the instant case, and it is not even very clear that the occurrence was caused by the suspect carton, for the plaintiff's testimony indicates a likely lack of connection between the attempt to lift the carton, and the break of glass at about the same time. The burden of proof has been considerably relaxed in many recent

cases, especially those that might require some expertise on the part of the customer, as in Zimmerman v. Safeway, U.S. App. D.C. No. 21556, decided March 20, 1969. However, the requirements that a party prove a case, i.e. that he do something other than relate a confusing tale, or prove facts in one version and disprove them in another must exist. The tendency is to give the plaintiff the benefit of the doubt when the proof is lacking, but it is another thing to require so little of a plaintiff that any story having the slightest trace of suspicion or indicating any deviation from some norm of supposed absolute safety is allowed to be considered as a case of negligence. This approaches the point where a businessman insures the safety of his customers, or where a legitimate and necessary business is conducted at the peril of the businessman, as if it were some evil practice.

The evidence of the plaintiff as to whether the carton actually failed comes within the double inference rule announced in Ewing vs. Goode, 78 F. 442 and quoted in Gunning v. Cooley, 281 U.S. 90, 50 S. Ct 231, 74 L. Ed 720. and followed in Capitol Transit v. Gamble 82 U.S. App. D.C. 57, 160 F2d 283. In order to find that the carton was defective and that the bottles came out of the bottom the jury would have to ignore the testimony of the store manager, who was plaintiff's witness, vouched for by the plaintiff, and also read something into plaintiff's testimony that was not there. Plaintiff's testimony seems to make it

nearly impossible for the dropped bottle to have come from the suspect carton.

CONCLUSION

This Appellant submits that the evidence of negligence on its part was insufficient to go to the jury, and that the plaintiff's evidence did not prove that the injury was caused by a defective carton but showed only that she was injured in the appellant's store. The case therefore should not have been submitted to the jury and the judgment should be reversed.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,208

MARIA A. LAWSON, Appellee,

v.

GIANT FOOD, INC., Appellant

No. 24,219

MARIA A. LAWSON, Appellee,

v.

ROCK CREEK GINGER ALE CO., INC., Appellant.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE MARIA A. LAWSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

*Cases or authorities chiefly relied upon are marked by asterisks.

Miscellaneous:

Federal Rules of Civil Procedure:

IN THE

UNITED STATES COURT OF APPEALS

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ROCK CREEK GINGER ALE CO., INC., Appellant.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE MARIA A. LAWSON

COUNTER-STATEMENT OF THE CASE

While engaged in her Friday morning grocery shopping (App. 14) with her customary shopping companion (App. 13) at the Giant Food Store she regularly patronized (App. 13, 14), Mrs. Lawson was injured between 9:00 and 9:30 a.m. As she was selecting for purchase a six-pack of Blair House club soda (a product bottled,

packaged, and delivered by Appellant, Rock Creek Ginger Ale Co., Inc.[1] (App. 73, 87, 88) (App. 18, 19), two bottles of soda fell from the six-pack, struck the floor, and exploded (App. 19, 23, 27-29), projecting a shard of glass into her right ankle and severing three extensor tendons in her right foot. The six-pack she chose was on the cardboard tray in which it had been delivered by Rock Creek some time between 8:00 that morning and the moment she was injured (App. 34, 39, 40). Several of these cardboard trays, each containing four six-packs of 12-ounce soda bottles,[2] were stacked on top of one another to a height approximating appellee's waist. (App. 18) in the store aisle in front of the permanent beverage display counter. (App. 38) As she testified, Mrs. Lawson demonstrated to the jury, using a six-pack of soda identical to the one she selected on the morning of her injury (App. 17), how she reached onto the tray and drew the six-pack toward her just before the bottles fell. (App. 17, 18, 27)

Three other witnesses[3] testified in Mrs. Lawson's case: Mrs. Louise Quick, appellee's shopping companion (App. 92); Mr. Nathan Malinick, Treasurer of appellant, Rock Creek Ginger Ale Company (App. 72); and Mr. Charles Carroll McCoart, the manager (from 1961 until now) of the Giant store at which Mrs. Lawson was injured. (App. 33)

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[1] Hereafter, "Rock Creek."

[2] Except the tray on which the defective carton from which the bottles fell, which contained only one.

[3] An orthopedic specialist retained by defendants to examine Mrs. Lawson also testified. The report of her physician (who was not available to testify at trial) and the records of her two hospital admissions were admitted in evidence without objection. However, neither the gravity or extent of her injuries, nor the amount of the jury's verdict, are challenged in this appeal.

Rock Creek bought the cardboard trays from the company which supplied the bottles. (App. 90) Each tray was designed to accommodate—for storage and deliveries—four six-pack cartons. Rock Creek bottled, packaged, and delivered Blair House soda. (App. 73) The bottling and packaging processes were done entirely by machinery, except for the loading and storage of the trays, which was done by hand. (App. 87, 88) The trayloads of six-packs were stored at the Rock Creek plant until requisitioned to fill orders for retail stores (App. 98, 90).

Rock Creek deliverymen were required by union contract to deposit the trays of six-packs at the delivery areas of the retail stores. (App. 90) The practice, however, at the Giant store in question was for the Rock Creek deliveryman to wheel the trays of six-packs from the loading platform directly onto the public space and to unload them in the aisle in front of the beverage display counter, a practice presumed to have been followed on the day of Mrs. Lawson's injury. (App. 35)

The established practice at Giant was to have the aisle in front of the beverage counter cleared, and six-packs placed on the counter, by the end of every business day. (App. 40) Deliveries were received from Rock Creek between 8:00 a.m. and noon on any given day. (App. 34) After the trays were wheeled onto the floor and deposited in the aisle in front of the beverage display counter by Rock Creek, a Giant clerk would then remove each six-pack from the tray, inspect it for defects or broken bottles, mark it with a price, and place it on the display counter, and, ultimately remove and discard the trays. (App. 38, 39, 62) The beverages stacked on the floor by Rock Creek, according to Giant's manager, were not offered "officially for sale" until each six-pack had been inspected, marked, and placed on the display counter. (App. 59)[4] Although Giant had experienced diffi-

[4] A purpose of the inspection was the discovery of defects in the cartons or bottles. (App. 61, 62)

culty with bottles falling out of Blair House Club Soda six-pack cartons (App. 49) with a once to twice weekly frequency over the three years preceeding Mrs. Lawson's injury (App. 50), no Giant employee was assigned to tell customers that this merchandise was not "officially for sale," nor did any sign announce that the stacked cartons of beverages had not been inspected and were not "officially for sale." (App. 59)

No Giant employee touched the six-pack in question from the time of its delivery until Mrs. Lawson was injured (App. 40). Moments after the injury, while a Giant employee was removing this carton, the remaining four bottles fell through the open, detached bottom of the six-pack carton. (App. 20, 23, 28)

SUMMARY OF ARGUMENT

Mrs. Lawson adduced such relevant evidence as a reasonable mind might accept as adequate to support a conclusion of negligence. *Avignone Freres v. Cardillo*, 73 App. D.C. 149, 150, 117 F.2d 385 (1940).

The plaintiff's evidence established one internally consistent, cogent theory of how her injury happened: Bottles fell from a six-pack carton in her hand which was later discovered to have a detached bottom.

There is no evidence in the record to support the claim that Mrs. Lawson was guilty of contributory negligence.

The trial Court correctly admitted evidence establishing the customary delivery, inspection and stacking procedures of Rock Creek and Giant. *United States v. Oddo*, 314 F.2d 115 (1963); *Tobin v. Midland Mutual Life Insurance Company*, 215 F.2d 92 (1958).

The Court correctly admitted evidence or prior accidents involving Blair House soda bottles and cartons to show notice of the dangerous condition which caused the injury. *Hecht Co. v. Jacobsen,* 86 U.S. App. D.C. 180 F.2d 13.

The Court correctly admitted evidence about the internal pressure of a twelve-ounce bottle of Blair House Club Soda; Rock Creek has neither claimed nor shown any prejudice resulting from the admission of this testimony.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

II. THERE WAS NO EVIDENCE OF CONTRIBUTORY NEGLIGENCE.

III. THE EVIDENCE WAS NOT IN EQUIPOISE; PLAINTIFF OFFERED A SINGLE, COGENT THEORY OF LIABILITY WHICH THE JURY AND THE TRIAL COURT ACCEPTED.

The theory of liability submitted to the jury against Rock Creek was that a defective six-pack carton of Blair House Club Soda was delivered to Giant an hour to an hour and one half before Mrs. Lawson was injured and that the defective carton permitted the bottles to fall and inflict injury upon her. Since the customer aisle in front of the beverage display counter had been cleared the night before the accident it is beyond argument that the carton from which the bottles fell arrived at Giant between 8:00 a.m. and the time of the accident. Contrary to the contractual requirement that shipments of club soda be deposited in the delivery area—out of the reach of customers—the shipment which included the defective carton was wheeled directly and deposited into the customer area by Rock Creek. Since Mrs. Lawson was the first to touch the carton, it necessarily follows that the carton was defective when delivered.

This is the kind of irresistible "common sense" conclusion which has been approved by this Court[5] and is consistent with the quality of evidence required to satisfy the standard set out in *Avignon Freres*: "substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

Mrs. Lawson met the standard by proving that two bottles fell from a recently delivered carton which was not connected or attached on its bottom in the prescribed fashion designed to avoid the very condition which produced her injury.

Rock Creek appears to say that although these facts raise an almost irresistible inference of negligence, this Court is obliged to overturn the jury's verdict because of a possibility that the cause of the accident might have been different.

> It is not the function of the Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of the witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different

[5] *Commercial Casualty Ins. Co. v. Hoage*, 64 App. D.C. 158, 159, 75 F.2d 677, 678 (1935).

> inferences or conclusions or because judges feel that other results are more reasonable. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944).

In this case, as in *Zimmerman v. Safeway Stores, Inc.*, ___ U.S. App. D.C. ___, 410 F.2d 1041 (1969), "the issue is not whether (Rock Creek) was or was not negligent, but whether that determination was one to be made by the jury." Here, as in *Zimmerman*, Rock Creek places "reliance upon the absence of any evidence that (it) either knew or (was) chargeable with knowledge of the existence of the dangerous defect in the (carton), that the defect might have been caused by plaintiff's own carelessness" in the way she tried to remove the six-pack.

> The first of these seems to us to posit a higher standard of omniscience in its customers than Safeway ordinarily exacts from the millions of invitees it strives so assiduously, by every device of the advertising and merchandising art, to attract to its stores. There is nothing in the record to support the second. In any event, we do not regard either as justifying a ruling that, on the evidence adduced, Safeway was free of liability as a matter of law. The average housewife setting out for the supermarket does not expect to be wounded by a defect in one of the carts she is invited to use, and, in the unlikely event that she is, she hardly possesses the technical resources to enable her to demonstrate just how the defect came about and how long it has been in being. *Zimmerman v. Safeway Stores, Inc.*, ibid, at p. 1045.

Rock Creek departed from its established routine. Rock Creek's deliveryman was, according to a union contract, obliged to leave the delivered cartons in a delivery area segregated from the public space within the store. Whether this failure, alone or in combination with Giant's failure to inspect the carton before offering it for sale to the

public, caused plaintiff's injury was clearly within the province of the jury to decide.

> Safeway sought, and was permitted to show, that it inspected its carts once a month at the time they were being cleaned, and that, in the experience of one of its veteran employees, defects of the kind in question occurred only infrequently. The jury might thus have concluded that Safeway's response to this danger was commensurate with its seriousness, and that Safeway had violated no obligation of reasonable care for appellant's safety. It might, on the other hand, applying its collective common sense to the facts, have thought that something more was required. This is not to allow the jury to speculate. It is to allow it to bring to bear on evidence which looks in different directions the practical wisdom and experience which has immemorially been thought to reside in the jury system. *Zimmerman v. Safeway Stores, Inc.*, ibid, at p. 1046.

Rock Creek also appears to say that the plaintiff's evidence of Rock Creek's negligence was somehow in equipoise at the end of the trial, some of it favoring one theory of liability and other evidence favoring another. The defect in this argument is that Rock Creek does not state what plaintiff's other theory of liability was supposed to have been. In fact, plaintiff relied on only one theory—that stated above—and the evidence she offered in support of this theory was her first-person, eye-witness testimony that the bottles fell, and immediately after they fell, the bottom of the carton was discovered to have been open and unattached.

The authorities relied on by Rock Creek cover an entirely different situation, one in which there is no direct testimony about how an accident occurred, and in which balanced inferences of negligence and absence of negligence could be drawn.

Rock Creek also misplaces reliance on the holding in *Willoughby v. Safeway Stores, Inc.*, 91 U.S. App. D.C. 168, 198 F.2d 604 (1952), in which the plaintiff's claim turned on an application of the doctrine of *res ipsa loquitur* and the application of a statutory implied warranty. Neither of these theories was advanced by Mrs. Lawson in this case.

The balance of Rock Creek's argument on these points amounts to a re-argument of the issues of fact found by the jury, the resolution of which cannot be disturbed here. *Zimmerman, supra.*

IV. THE TRIAL COURT CORRECTLY ADMITTED EVIDENCE RELATING TO PRIOR ACCIDENTS TO SHOW NOTICE; TO CUSTOMARY DELIVERY, INSPECTION AND STACKING PRACTICES; AND TO THE INTERNAL PRESSURES OF THE BOTTLES WHICH BROKE. AS TO THE LAST OF THESE, NO PREJUDICE IS CLAIMED OR SHOWN.

Rock Creek's remaining contentions concern the admissibility of certain testimony. The testimony elicited about internal pressures within Blair House soda bottles was designed to lead to an argument that club soda, having a higher internal pressure than other varieties of beverages produced by Rock Creek, should be packaged more carefully to avoid breakage. The testimony of the Rock Creek official was to the effect that several of Rock Creek's beverages were bottled at the same internal pressure. This line of questioning was then abandoned and no argument was made, nor instruction given, related to this testimony. No prejudice, other than a generalized statement that this testimony had the effect of "smoking over the real issue in this case" is claimed or demonstrated by Rock Creek. The short answer to this point is that there is no prejudice and that under Rule 61, Federal Rules of Civil Procedure, the Court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The second claimed error related to the store manager's testimony about delivery by Rock Creek of the broken carton on the morning of plaintiff's injury. He stated that all store aisles were cleared of merchandise the night before; that since plaintiff encountered this six-pack stacked with others in the aisle, the delivery of this carton was made sometime between 8:00 and 9:30 that morning; and that the carton was trucked onto Giant's display floor by Rock Creek's employee. That the manager had no specific recollection of this particular delivery is wholly irrelevant, since a regular procedure had been established for the delivery and stocking of these beverages, and since no evidence was offered to show that there had been a departure from this procedure that morning. Plaintiff was entitled to show the existence of a regular procedure or custom, and, once having proved that one existed, she was entitled to the benefit of the presumption that on the day she was injured there had been no departure from the established practice. See: 1 Wigmore, Evidence §93. *United States v. Oddo*, 314 F.2d 115 (1963); *Tobin v. Midland Life Insurance Company*, 215 F.2d 92.

Last, Rock Creek claims that it was error to admit testimony about prior incidents involving broken Blair House soda bottles and cartons at the Giant store, relying on an ancient decision[6] which it is claimed, supports this position. This decision—plainly inapposite—involved a proffer of testimony, in a breach of contract case, to show that the plaintiff previously had done inferior and defective work of a similar kind (to that done for defendant) on the house of another person. In the first place, Rock Creek has obviously confused the objective of eliciting testimony about prior occurrences of a similar kind at the same Giant store. The function of this testi-

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[6] *Schaffer v. Lehman*, 2 MacArthur 305 (1875). This decision was not "upheld" in a later criminal case—equally inapposite—*Randle v. United States*, 72 App. D.C. 368.

mony was not to attempt to prove a negligent act by showing that other similar negligent acts had happened earlier; its limited purpose was, of course, to show that Giant had notice of a potentially dangerous condition likely to cause injury to customers, the legitimacy of which has long been settled in this jurisdiction.

> "Evidence of prior accidents has always been admissible to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident." *Hecht Co. v. Jacobsen,* 86 U.S. App. D.C. 81, 85; 180 F.2d 13, 17 (1950), citing *Sullivan v. Detroit & Windsor Ferry Co.*, 238 N.W. 221, 222 (1931) and *Capital Traction Co. v. Copland,* 47 App. D.C. 152, 159 (1917).

Secondly, this testimony provided a foundation for the manager's later testimony that, aware of the problem, he had actually set up an inspection procedure[7] to insure against, among other things, the very same condition which caused plaintiff's injury.

CONCLUSION

Rock Creek's claims of error are unsubstantiated and without merit, either in fact or in law, and the judgment below should be affirmed.

Respectfully submitted,

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[7] A procedure which, he testified, had not been followed on the morning of plaintiff's injury.

Nos. 24,208, ~~24,219~~

United States Court of Appeals

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TABLE OF CONTENTS

TABLE OF CASES

---

* Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLEE MARIA A. LAWSON

COUNTER-STATEMENT OF THE CASE

A generally complete statement appears in the brief Mrs. Lawson filed answering Rock Creek's appeal. What follows here is an elaboration of that part of the evidence relating to the two points on which Giant's appeal rests.

Over the three-year period preceding Mrs. Lawson's injury, Giant's manager knew that Blair House Club Soda bottles were falling out of six-pack cartons with a once-to-twice weekly frequency. (App. 49, 50) He had established a "normal procedure" for inspecting the six-pack cartons and bottles (App. 62) before they were put on display shelves and offered "officially for sale." (App. 59, 62) Only "good merchandise" would be placed on the shelf (App. 62).

Mrs. Lawson testified and demonstrated how she had selected a full six-pack of soda; pulled it in the tray toward her; heard the bottles crash on the floor; immediately noticed the first effects of her injury; and, redirecting her attention to the six-pack still in her grasp, saw that two of the six bottles had fallen out. (App. 17-19, 23, 27-29) Within minutes she saw a Giant employee lift the six-pack carton from the tray and watched while the bottom of the carton opened and the remaining four bottles fell out. (App. 20, 23, 28)

Giant produced an open (unfolded) six-pack carton at the trial which Mrs. Lawson introduced in evidence. Although Mrs. Lawson's name and telephone number were handwritten on the carton produced, Giant's manager could not recall having marked it (App. 70); could not "honestly identify" it as the carton involved in the injury (App. 70); could only reasonably assume that it was (App. 71; could not recall whether he or someone else removed the carton from the scene (App. 53, 65); could not specifically recall whether he had inspected the carton after the accident (App. 62); and had no recollection of where the carton was removed from, the tray (where Mrs. Lawson saw it when the bottom fell out) or the floor (App. 71). He did not look at *any* carton until Mrs. Lawson had left the store and was en route to the hospital. (App. 53, 65)

Although during cross-examination Giant's manager answered that the carton he eventually believed to have been involved in the injury was intact when he saw it, he was not asked – during cross-examination – about Mrs. Lawson's testimony of watching the bottom and the remaining four bottles

fall out of the carton which actually produced the injury. But he did state that the carton was pulled apart to "store" it. (App. 72)

SUMMARY OF ARGUMENT

Giant's obligation of due care extended to a reasonable inspection of the six-pack carton to identify and protect against the hazard of bottles falling out, the potential for which Giant had abundant notice. *Seganish v. District of Columbia Safeway Stores, Inc.*, 132 U.S. App. D.C. 117, 118; 406 F.2d 653 (1968).

Having voluntarily set up an inspection procedure, the duty which Giant assumed could not be negligently abandoned without incurring liability for the injury which resulted from the abandonment. *Robitscher v. United Clay Products Co.*, 143 A.2d 99, 101 (1958).

The evidence was sufficient to support the verdict. *Zimmerman v. Safeway Stores, Inc.*, ____ U.S. App. D.C. ____; 410 F.2d 1041 (1969); *Seganish v. District of Columbia Safeway Stores, Inc., supra* (1968); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); *Avignone Freres v. Cardillo*, 73 App. D.C. 149, 150, 117 F.2d 385 (1940).

ARGUMENT

I. GIANT'S OBLIGATION OF DUE CARE EXTENDED TO REASONABLE INSPECTION OF RECENTLY DELIVERED CARTONS OF CLUB SODA; GIANT HAD VOLUNTARILY ASSUMED A DUTY OF INSPECTION; GIANT FAILED TO DISCHARGE THIS DUTY AND AN INJURY TO MRS. LAWSON RESULTED.

For at least three years before Mrs. Lawson was injured, Giant was aware that soda bottles were falling out of six-pack cartons with a once-to-twice weekly frequency. Indeed, notice of this peril cannot be denied.

Nevertheless, Giant relies on what it characterizes as a "general rule" that it had no duty to inspect these containers because they were "merchandise

that is not of an inherently dangerous character." Without considering whether glass bottles which frequently fall out of their cartons fall into an "inherently dangerous" category, the duty violated here was Giant's obligation of reasonable inspection to protect against the potential peril which it knew existed. *Seganish v. District of Columbia Safeway Stores, Inc., supra.*

That Giant recognized – or assumed – this as a duty is also beyond argument. Giant had in fact established a routine inspection procedure calculated to discover and render harmless the very condition which caused the injury. Giant considered this responsibility sufficiently important that it did not consider this particular merchandise "officially" available for sale to the public until the inspection process had been completed.[1] Thus, whatever standard of inspection might be considered in the abstract to have devolved upon Giant, the fact remains that Giant established its own standard by setting up an inspection routine. Having voluntarily set up an inspection procedure – plainly for the benefit of its customers – the duty which Giant assumed could not be carelessly abandoned without incurring liability for the injury which resulted from the abandonment. *Robitscher v. United Clay Products Co., supra.* Also see: *Gerace v. Liberty Mutual Insurance Co.*, 264 F. Supp. 95, 97, which recognizes the principle that one "who volunteers to do something that he is under no obligation to do, must nevertheless use due care in carrying on the voluntary activity."

There was an alternative course of action open to Giant. If the exigencies of preparing for an early morning store opening made immediate inspection of the cartons impractical, Giant could, and perhaps should have ordered that the trays be deposited by Rock Creek in the delivery area – insulated from the general public. This practice would have squared with the Rock Creek deliveryman's obligation – under his union contract – to deposit the

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[1] Giant did not, however, publish this internal policy to its customers, or establish a method to insulate the public from contact with this merchandise.

trays there. And the peril which ultimately caused the injury could thereby have been averted.

The actionable negligence proved by Mrs. Lawson was Giant's failure to observe its own standards of care, a failure which placed the defective carton in Mrs. Lawson's hands rather than those of an employee assigned to discover just such a defect.

II. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT

The testimonial inconsistency to which Giant pins its argument that facts lending equal support to each of two inconsistent inferences support neither inference by a preponderance is the suggested difference between Mrs. Lawson's testimony that she saw the bottom fall out of the carton and the Giant manager's that he found the bottom to be intact. This argument begs the question raised – and the fact established – by Mrs. Lawson's clear description of what she saw. In fact, there is no contradiction at all. Giant's manager described a six-pack carton he saw at a different time, and quite possibly by his own testimony, in a different place, than the carton Mrs. Lawson described. He could not even say with certainty that the carton which Giant produced at trial was the one from which the bottles fell. For the jury to have decided that the carton bottom was attached would have required it to favor a version clouded with uncertainties to one which was clear, reasonable, and to this jury, convincing.

Some testimonial inconsistency is not an uncommon phenomenon in the record of a trial. And a jury is not bound to a rigid rule requiring exclusion of "every other speculative theory." *Christie v. Callahan,* 75 U.S. App. 133, 148, 124 F.2d 825, 840. In *Baltimore & Ohio R. Co. v. Postom,* 85 U.S. App. D.C. 207, 208, 177 F.2d 53, 54 (1949) this principle was stated:

> "From the mere fact that the evidence permits two or more possible inferences, it does not necessarily follow that the evidence is not substantial, and is not sufficient to sustain a jury's finding. To be substantial, the evidence need not point only in one direction.

Giant's argument questioning the sufficiency of the evidence is quite the same as that advanced by Rock Creek. Rather than repeat the argument already presented in her earlier brief, Mrs. Lawson incorporates by reference here the argument contained in pages 5 to 9 of her other brief.

CONCLUSION

The questions presented on appeal were clearly within the province of the jury to decide. The judgment against Giant should be affirmed.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 24208

MARIA A. LAWSON,

v.

GIANT FOOD, INC., *Appellant.*

No. 24219

MARIA A. LAWSON,

v.

ROCK CREEK GINGER ALE CO., INC., *Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT ROCK CREEK GINGER ALE CO., INC.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT ROCK CREEK GINGER ALE CO., INC.

STATEMENT OF ISSUES PRESENTED

1. The evidence is insufficient to establish liability on the part of the appellant, Rock Creek Ginger Ale Co., Inc., and a directed verdict or a motion for N.O.V. should have been granted.

REFERENCES to RULINGS:

1. AS to ISSUE No. 1 - (App 7, 96)
2. AS to ISSUE No. 4a - (App. 77, 79, 81-82, 86)
3. AS to ESSUE No 4b - (App. 38)
4. AS to ISSUE No. 4c - (App. 46)

2. The evidence of the appellee, considered in its most favorable light, establishes a theory on which there may be liability, and one in which there is no liability, and therefore she did not sustain her burden of proof.

3. The appellee was contributorily negligent as a matter of law.

4. It was error to admit evidence of the following:

(a) Testimony with regard to pressures and dangers inherent in the bottles;

(b) Testimony with regard to time, place and mode of delivery of the product in question, based on customary practice;

(c) Testimony with regard to prior accidents and problems concerning cartons and bottles.

This case has not previously been before this Court.

STATEMENT OF THE CASE

Appellee was injured by a piece of glass which came from a bottle of appellant's club soda, which exploded when it fell on the floor in a Giant Food market on the morning of September 16, 1966.

Appellee filed suit against appellant, and Giant Food, Inc., appellant, in case No. 24208, and a jury verdict in the sum of $26,035.01 was returned on January 15, 1970. A motion to set aside the jury verdict and to enter judgment for appellant, or grant a new trial, and/or to grant a remittitur was filed on January 22, 1970, and by Order of March 9, 1970. A Notice of Appeal was filed on April 2, 1970.

On September 16, 1966, the appellee went to the Giant Food Store and as she approached the beverages she saw a cardboard tray

with an edge around it that held four six-pack cartons with only one carton in this particular tray (App. 18).

Appellee testified that she never picked up the particular six-pack involved, but rather pulled it towards her to the end of the tray and heard a noise and was hurt (App. 27-28). She stated that she did not know how the two bottles got on the floor, or how they got out of the tray, nor did she see the bottles fall (App. 28-29).

Appellee called as her own witness Charles McCoart, the Giant Food store manager (App. 33). He testified that he removed the particular carton and inspected it, and found the carton intact (App. 53, 63).

Appellee called as her own witness Nathan Malinick, appellant's treasurer. He testified that appellant goes to the carton manufacturer and tells them what is to be packaged, and the carton manufacturer furnishes the type carton that will do the job (App. 82). He further testified that the bottles are fastened into the carton and the carton is locked together (App. 87-88). The cartons are then conveyed to a station where they are placed in a cardboard tray that has a side of three to four inches. This is not done by machine but rather by hand, and then they are delivered to a storage area for delivery to different stores (App. 89-90).

SUMMARY OF ARGUMENT

In addition to the numerous evidentiary errors, it is respectfully submitted that the entire evidence of the appellee shows that the accident could not have occurred the way she testified, and her witnesses showed no negligence on the part of the appellant. In all there is a complete lack of evidence upon which to sustain her case.

ARGUMENT

1. **THE EVIDENCE IS INSUFFICIENT TO ESTABLISH LIABILITY ON THE PART OF THE APPELLANT, ROCK CREEK GINGER ALE CO., INC., AND A DIRECTED VERDICT ON A MOTION FOR N.O.V. SHOULD HAVE BEEN GRANTED;**

2. **THE EVIDENCE OF THE APPELLEE, CONSIDERED IN ITS MOST FAVORABLE LIGHT, ESTABLISHES A THEORY ON WHICH THERE MAY BE LIABILITY, AND ONE IN WHICH THERE IS NO LIABILITY, AND THEREFORE SHE DID NOT SUSTAIN HER BURDEN OF PROOF.**

Inasmuch as issues 1 and 2 are similar, they will be considered together.

The main thrust of the appellant's argument is that the appellee failed to sustain her burden of proof, failed to sustain a prima facie case, and therefore a directed verdict or the motion for judgment N.O.V. should have been granted.

Appellee failed to prove that the carton was defective and this is an essential element for recovery. It is urged by appellant that the jury concluded that because of the bottle(s) falling, that there was therefore something wrong with the carton. It is of course insufficient to prove negligence by the mere fact of the happening of an accident.

There were two witnesses as to the condition of the carton. The appellee testified that after the accident she saw the bottom of the carton open when a man picked it up (App. 23). Even though credibility is not an issue on this appeal, it is hard to say how she could see from the floor and in her present condition, which was that she was not feeling well and needed smelling salts to keep her conscious (App. 22). She could very well have seen the side of the carton which was open. Her further testimony, even if there was a

defect, would show that that was not the cause of the bottle(s) falling and fully shows that even the appellee did not know what caused them to fall. She testified that she was positive that she never picked up this particular six-pack, nor used any pressure to pull it up (App. 27). She said that she pulled them toward her in the box, but did not know how the bottle(s) got to the floor (App. 28). She did not move the six-pack at all after she heard the noise (App. 29). She never saw the bottle(s) fall (App. 29).

The other witness as to the condition of the carton was Charles McCoart, the store manager, who was called as her own witness and not as an adverse witness, and this was re-affirmed that he was not called as an adverse witness after specific inquiry from the Court (App. 33, 56). Therefore, appellee is bound by her own evidence. McCoart testified that the carton was inspected by him and was not defective (App. 63).

It is a long settled rule of law that if a plaintiff produces two theories, one which shows liability and one which does not, then she has proved neither and her case fails. The Court in *Cap. Transit Co. v. Gamble*, 82 U.S. App. D.C. 57, 160 F.2d 283, (1947) said:

> "When a plaintiff produces evidence that is consistent with a hypothesis that the plaintiff is not negligent, and also with one that he is, his proof tends to establish neither."

Also, in *Stevens v. Willis*, 175 A.2d 600 (1961), the District of Columbia Court of Appeals said:

> "Since causes other than negligence on the part of the appellees might have produced the act, it was encumbent upon appellant to exclude such causes by a preponderance of the evidence."

Again in *Rule v. Bennett*, 219 A.2d 491 (1966), the District of Columbia Court of Appeals said:

> "If two possible conclusions can be inferred from the evidence adduced, neither can be said to have been proved, and the judgment must go against the party upon whom the burden rests."

In *Willoughby v. Safeway Stores*, 91 U.S. App. D.C. 168, 198 F.2d 614, (1952), the court found that no negligence was shown in either the manufacture of the carton or in its use by Safeway. There is no distinction in the facts between that case and this case that is material. In Willoughby, the plaintiff said the handle of the carton came off. In our case, the plaintiff said the bottom of the carton came off.

In this case it is a complete impossibility that the accident happened the way the plaintiff wants us to think it happened. She said she never picked the carton up, and the side of the tray holding the carton was three to four inches high (App. 27, 89). Thus, the bottles did not fall as a result of the alleged defective bottom.

Aside from the consideration of the admissions into evidence of certain testimony, supra, it is very important to note that even if the carton was defective there is no evidence to prove that we had notice of it or that it was caused by us. The testimony of Nathan Malinick, appellant's treasurer, who was called as a witness for the appellee and not as an adverse witness, was the only evidence of the condition of the cartons from the time they were packaged until they were delivered to the retainer (App. 72, 76). He testified that bottles were packaged by a machine and the cartons were then conveyed to a station where they were placed in a cardboard tray, which is not done by machine, and then delivered to a storage area for delivery as needed to the retailer (App. 87-90). Thus the cartons

were inspected at the end of the conveyor where they are picked up by appellant's employees to be placed in the cardboard tray and then they are thereafter handled by trays. McCoart said they are left in front of the display on the floor in a stack of 8-10 trays high (App. 35-36). The testimony of the appellee was that there was only six-pack left in the tray (App. 18). Therefore, it becomes important to note that other persons had handled the six-packs. The uncontradicted testimony is that the appellant's employees were not allowed to stack the six-packs on the shelf (App. 36, 90). There was no testimony to show when this particular six-pack arrived at the store. The testimony cannot relate the time of delivery of the bottles to the time of the accident. It is pure speculation in that regard. The appellee could have produced evidence to show when the delivery was made by subpoenaing appellant's records on the delivery of the truck, but instead relied on the improperly admitted evidence concerning delivery, which in and of itself could have been after the accident (App. 34). The whole evidence is lacking in any respect with regard to appellant's connection with the alleged defective carton. Just the contrary, the evidence shows that if in fact the carton was defective, it had to happen after it arrived at Giant Food.

Therefore, appellant contends that the appellee did not sustain her case and prove that the carton was defective, and all other matters relating to notice, etc. are not relevant or material. The appellee must prove a defective carton before she can attempt to prove notice. In fact the Trial Judge told appellee's counsel almost at the end of his case and after appellee had testified, that there had been no proof yet that the bottom was defective (App. 75). Assuming she proved a defective carton, it was not proved that it was defective when delivered or that appellant had any notice of the defective condition.

3. THE APPELLEE WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

As the court noted during the trial, the plaintiff was extremely careless in the handling of the carton. The defendants contend that she has shown herself contributorily negligent as a matter of law. She obviously was not careful or attentive to what she was doing. She testified that she did not know how the bottle(s) got on the floor (App. 28). She did not see the bottle(s) fall from the package and the only inference from that testimony is that she was not watching what she was doing; or that it was a bottle from some other place (App. 29). She further testified that she dragged the carton along the top of the box (App. 28). The only logical inference from that is that she may have damaged the bottom. Thus her own testimony shows her own negligence, rather than the negligence of the appellant.

4. IT WAS ERROR TO ADMIT EVIDENCE OF THE FOLLOWING:

(a) Testimony with Regard to Pressures and Damages Inherent in the Bottles;

(b) Testimony with Regard to Time, Place and Mode of Delivery of the Product in Question, Based on Customary Practice;

(c) Testimony with Regard to Prior Accidents and Problems Concerning Cartons and Bottles.

In furtherence of the appellee's objective to smoke over the real issue in this case, there were constant references and attempts to introduce into evidence and the actual introduction into evidence of matters relating to bottles and their inherent dangers. This whole attempt constantly mislead and misdirected the jury as to the real issue in the case. The Court constantly told appellee's counsel that this was a defective carton case, but yet allowed the references and

admission of evidence with regard to dangers inherent in carbonated beverages (App. 77, 79, 81-82, 86). This was entirely irrelevant and immaterial.

The Court erred in allowing into evidence vague and indefinite testimony as to the delivery of the particular cartons in question and the length of time which they had been on the premises. The custom and practice of deliveries to the store by the defendant, Rock Creek Ginger Ale Co., Inc., did nothing but allow the jury to speculate as to the actual time and date of the delivery. In essence, it allowed the jury to make an inference based upon an inference. From the testimony, it would be impossible to say whether the delivery was made one day before, or one minute before (App. 34, 37-38).

The Court further erred in allowing testimony of prior accidents in the store. The testimony of an average of two (2) broken bottles a week did nothing but create prejudice in the minds of the jury and was not material or relevant to the issue in question. There was no evidence that these broken bottles were related to any particular cause. The law in the District of Columbia has always been that similar defects are inadmissible. *Schaffer v. Lehman*, 2 MacArthur 305, (1875) and upheld in *Randall v. United States*, 72 App. D.C. 368, 113 F.2d 945 (1940). Even assuming similar accidents are allowed in evidence in order to prove notice, there never was any evidence to show that this accident was similar to the other bottles falling, and this was pointed out to appellee's counsel by the Trial Judge (App. 74). The witness, McCoart, stated that he did not recall Rock Creek having this problem (App. 48, 62).

CONCLUSION

It is therefore respectfully submitted that the entire record on appeal shows that the appellee did not present a prima facie case against this appellant. It is clear that she was unable to prove the cause of the accident and failed to connect the appellant in any manner with the injuries received by her in this accident. Therefore, the appellant asks this Court to reverse the judgment entered in favor of the appellee and to enter judgment in favor of the appellant, and/or to grant a new trial based upon the improperly admitted evidence.

Respectfully submitted,

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